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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND
BALTIMORE, MARYLAND 21202

ROSZEL C. THOMSEN
CHIEF JUDGE

May 31, 1966

Thomas J. Kenney, Esq.
United States Attorney
409 Post Office Building
Baltimore, Maryland 21202

Lawrence R. Houston, Esq., General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Ernest C. Raskauskas, Esq.
910 17th Street, N.W.
Washington 6, D.C.

Robert J. Stanford, Esq.
1730 M Street, N.W.
Washington, D.C. 20036

Paul R. Connolly, Esq.
Hogan & Hartson
815 Connecticut Avenue
Washington, D.C. 20006

RE: Heine v. Raus - Civil No. 15952

Gentlemen:

Mr. Kenney has delivered to me his letter of May 31, 1966, in the above matter, together with the affidavit of Mr. Houston and the two page attachment thereto. I have put the letter in my safe. Mr. Kenney tells me that he also has a copy of the affidavit and attachments in his safe, so they may be examined by counsel for the plaintiff and counsel for the defendant either at the office of the General Counsel of the C.I.A. or in the office of the United States Attorney in Baltimore upon arrangements made with Mr. Kenney. Since I will be away after this week, I suggest that any examination

in Baltimore be made in the office of Mr. Kenney as my safe will be closed and locked.

I further direct that any reference to the matter covered by the affidavit and attachment in the briefs of either the plaintiff or the defendant be written up as separate pages and two copies of those pages be sent to me, under separate cover, so that they may be kept under seal until the hearing in the case. The rest of the briefs, of course, should be filed in the usual way, one copy to the Clerk and one copy to the Judge.

Very truly yours,

Roszel C. Thomsen

Chief Judge

RCT:LEL

TJK:BH
62849

May 31, 1966

Ernest C. Raskauskas, Esq.
1418 Ray Road
Hyattsville, Maryland

Paul R. Connolly, Esq.
5411 Albemarle Street, N. W.
Westmoreland Hills
Washington, D. C. 20016

Lawrence R. Houston, Esq.
General Counsel
Central Intelligence Agency
Washington, D. C. 20505

Re: Eerik Heine v. Juri Raus
Civil Action No. 15952

Gentlemen:

Enclosed you will find a copy of a self-explanatory letter delivered to Chief Judge Thomsen today.

Sincerely yours,

Thomas J. Kenney
United States Attorney

enc

May 31, 1966

Honorable Roszel C. Thomsen
Chief Judge
United States District Court
United States Courthouse
Baltimore, Maryland

Dear Judge Thomsen:

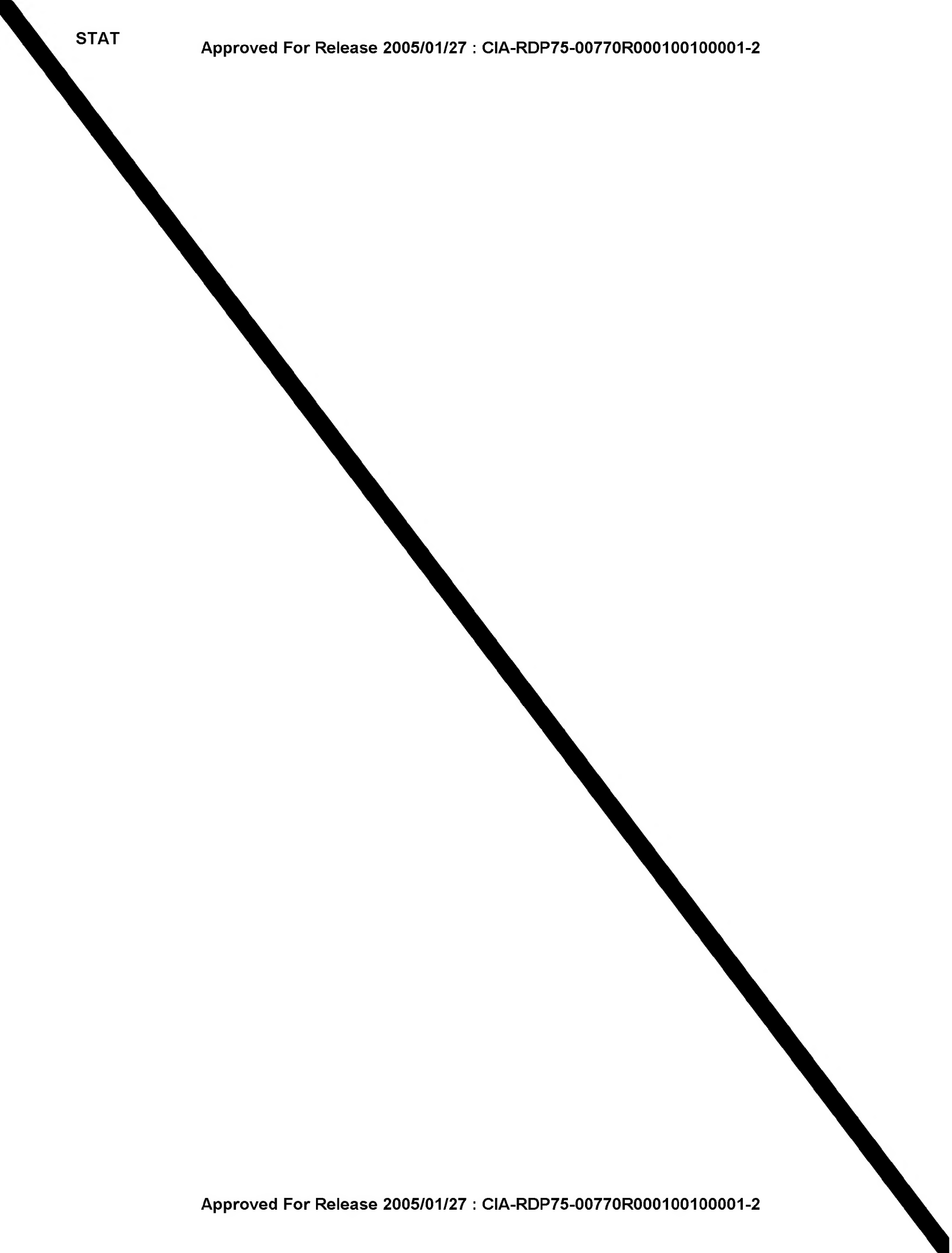
At the hearing on May 13, 1966 in the case of Merik Heine v. Juri Raus, Civil Action No. 15952, the Court requested that Mr. Lawrence Houston, General Counsel of the Central Intelligence Agency, submit a statement as to the legal authority of the C.I.A. to engage in activities within the United States with respect to foreign intelligence sources.

In response to that request, Mr. Houston has prepared an affidavit which incorporates by reference two pertinent paragraphs of a document which is classified "Secret" and which cannot be de-classified for purposes of this case. Because of this, Mr. Houston has requested the Department of Justice to submit to the Court under seal for in camera inspection the identification of the document and the two pertinent paragraphs, properly certified. The Court, of course, is authorized to make the classified excerpts available for inspection, but not for copying, by counsel now of record for the plaintiff and the defendant. In addition, any of such counsel will be granted access upon request to the two pertinent excerpts at the office of Mr. Houston. Of course, counsel should not disclose the excerpts thus made available.

Sincerely,

THOMAS J. KENNEY
United States Attorney

CC: Mr. Connally, Counsel for Defendant
Mr. Mackauskas, Counsel for Plaintiff
Mr. Houston, General Counsel, C.I.A.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE, Plaintiff,	)	
v.	)	Civil Action No. 15952
JURI RAUS, Defendant.	)	

MEMORANDUM CONCERNING THE AUTHORITY OF THE CENTRAL INTELLIGENCE AGENCY

At the continued hearing on May 13, 1966 on the defendant's Motion for Summary Judgment, the Court requested that there be filed a memorandum setting forth the defendant's claim as to the authority of the Central Intelligence Agency to have acted within the United States in the manner disclosed by the affidavits of the Deputy Director of Central Intelligence, Richard Helms. 1/

Barr v. Mateo, 360 U.S. 564 (1959) and Howard v. Lyons, 360 U.S. 593 (1959), however, suggest that the more appropriate test is whether the challenged act is within the "outer perimeter" of the Agency's authority.

1/ Since it does not appear that the defendant's act was discretionary on his part, the criterion is the Agency's authority rather than that of Juri Raus.
The defendant will contend in his closing brief, as he has already contended, that, if the order or directive given him was colorably authoritative, he possesses absolute immunity, irrespective of whether his superior acted within the appropriate ambit of his authority or not. Any other rule would place an intolerable burden upon the ministerial government employee, acting under orders and the discipline of his service, to devine the legitimate reach of governmental power which is frequently a most difficult legal question.

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WASHINGTON, D. C. 20006

The plaintiff, raising an objection to the sufficiency of the Agency's authority, contends: 2/

> It cannot be argued that the defendant was performing some function for the Agency under 403(d)(4) or (5), either in collaboration with another intelligence agency or at the direction of the National Security Council, inasmuch as 403(d)(3) contains a mandate excluding participation of the agency from 'internal security functions.' Accordingly, statutory authority for the conduct of the defendant against the plaintiff is non-existent. P. Br. I, pp. 11-21. 3/

Plaintiff's attempt to classify this case as one involving "internal security" begs the question and reflects his counsel's own convenient preconceptions. The attempted classification is far too rigid.

The third Helms' affidavit recites:

> The defendant was instructed to warn members of Estonian emigre groups that Eerik Heine was a dispatched Soviet intelligence operative, a K.G.B. agent. The purpose for this instruction was to protect the integrity of the Agency's foreign intelligence sources, existing within or developed through such groups, in accordance with the Agency's statutory responsibility to collect foreign intelligence and the

---

2/ The plaintiff has submitted three memoranda concerning the present motion. Each, for simplicity of reference will be referred to as follows:

(a) "Memorandum of Points and Authorities in Opposition to the Defendant's Motion for Summary Judgment," pp. 1-16, served February 23, 1966 -- P. Br. I.

(b) "Points and Authorities in Opposition to Defendant's Motion to Amend Answer and in Opposition to Informal Request for Additional Hearing," pp. 1-8, served March 31, 1966 -- P. Br. II.

(c) "Supplemental Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment," pp. 1-10, served April 26, 1966 -- P. Br. III.

3/ The plaintiff then attempts in his memorandum (P. Br. I, pp. 12-13) to show that internal security questions are committed by law to agencies of government other than the C.I.A. He also claims that the burden to establish statutory authority is upon the defendant. P. Br. I, p. 13. The converse is, of course, correct. There is a presumption that governmental officers act lawfully and within their statutory authority. Strothers v. Lucas, 12 Pet. (U.S.) 691 (1837); Hammond v. Hull, 76 U.S. App. D.C. 301, 131 F.2d 23 (1942), and 20 Am. Jur., EVIDENCE §170.

He subsequently reiterates that the C.I.A. has no "internal security functions." P. Br. III, p. 5.

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> statutory responsibility of the Director of Central Intelligence to protect foreign intelligence sources and methods.

This is a clear statement that the Estonian emigre groups to which the defendant spoke were sources of foreign intelligence. That emigre groups, especially from Soviet-dominated lands, would be sources of foreign intelligence is readily apparent. The Soviet penchant for maintaining a closed society renders it necessary to develop unconventional sources of information, in order to learn of the current geography and topography of Soviet-dominated countries and the social, economic and political condition of their people.

One would expect to find within such emigre groups persons who would possess firsthand knowledge of such matters and who, by reason of friends or family still in their homeland, would hear of such matters in the course of various communications with them. It is also obvious that, in view of the police-state nature of its society, Soviet intelligence would be interested in discovering the identity of those persons within various emigre groups who possessed information about their homeland or who possessed the means of acquiring it. The nature of the information obtained and imparted, and the ultimate sources from which it came, would be of the foremost interest.

More subtle topics of inquiry for Soviet intelligence suggest themselves: Whether the sources of information may be polluted so as to impart false information; whether the emigre groups contain members who could be duped or recruited into Soviet intelligence activity; whether the social and political unity of such emigre groups may be corrupted so as to render them ineffective as further instruments of anti-Soviet activity.

The existence of foreign intelligence sources within communities of recent emigrants is therefore quite obvious. The protection of such groups against Soviet-dispatched agents may collaterally involve a matter

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of internal security, but that incidental or collateral condition does not inhibit the Central Intelligence Agency and the Director of Central Intelligence from executing its statutory responsibilities.

The scope of that statutory responsibility is broad. See 50 U.S.C. §403 et seq. Among the tasks entrusted to it are [§403(d)]:

> "(1) to advise the National Security Council in matters concerning such intelligence activities of the Government departments and agencies as relate to national security;
>
> "(2) to make recommendations to the National Security Council for the coordination of such intelligence activities of the departments and agencies of the Government as relate to the national security;
>
> "(3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: Provided, That the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions: Provided further, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: And provided further, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;
>
> "(4) to perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally;
>
> "(5) to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct."

One of the specific tasks entrusted to the Agency is the protection of intelligence sources. It cannot be successfully contended that the method employed in this case, namely to warn an intelligence source against compromising itself to its adversary, was clearly beyond the Director's authority or beyond its "outer perimeter" Moreover, §403(d)(4) provides that the Agency shall perform "such additional services of common concern as the National Security Council determines can be more effectively accomplished centrally." It is believed that the National Security Council Directive No. 2, issued under this specific grant of power and attached to the affidavit

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of Lawrence R. Houston, General Counsel of the Central Intelligence Agency, satisfactorily answers the plaintiff's contention as to the insufficiency of the Agency's authority.

It is submitted that there is no substance to the claim of lack of authority, once the Court's in camera papers are viewed, if the explicit language of the statute did not already adequately supply the requisite authority for the defendant's conduct. Once the emigre group is perceived as a source of foreign intelligence -- a logically as well as specifically established fact -- the consequent activity of the defendant is a recognized and expected response to a contemplated threat to the security of that source.

Respectfully submitted,

By _____
Paul R. Connolly
5411 Albemarle Street
Westmoreland Hills
Washington, D. C. OL 2-5851

By _____
E. Barrett Prettyman, Jr.
3708 Bradley Lane
Chevy Chase 15, Maryland OL 6-7289

Attorneys for Defendant

OF COUNSEL:

Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

CERTIFICATE OF SERVICE

A copy of the foregoing MEMORANDUM CONCERNING THE AUTHORITY OF THE CENTRAL INTELLIGENCE AGENCY was mailed this 27th day of May, 1966 to Ernest C. Raskauskas, Esquire, 910-17th Street, N. W., Washington, D. C., and Robert J. Stanford, Esquire, 1730 M. Street, N. W., Washington, D. C., Attorneys for Plaintiff.

Paul R. Connolly
815 Connecticut Avenue
Washington, D. C.

Attorney for Defendant

HOGAN & HARTSON
815 CONNECTICUT AVENUE
WASHINGTON, D. C. 20006

SECRET

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE,
Plaintiff,

v.

JURI RAUS,
Defendant.

Civil Action No. 15952

Lawrence R. Houston, General Counsel of the Central Intelligence Agency, being first duly sworn, deposes and says that:

1. This statement is submitted in response to the Court's request for a memorandum as to the legal authority of the Central Intelligence Agency to engage in activities within the United States with respect to foreign intelligence sources.

2. Section 102(d) of the National Security Act of 1947, as amended, provides at Subsection (4) (50 U.S.C. §403(d)(4)), that for "the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Central Intelligence Agency, under the direction of the National Security Council...to perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally."

SECRET

This document will be considered unclassified upon removal of the enclosures.

3. National Security Council action in implementation of Section 102 of the National Security Act is set forth in paragraph 7 of National Security Council Directive No. 2, attached to this affidavit.

S/ Lawrence R. Houston
Lawrence R. Houston

*Attachments as stated

STATE OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

Subscribed and Sworn to before me this 26th day of May, 1966.

H Edward L. Dougherty, Jr.
Notary Public

My commission expires 24 September 1969.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE

vs.

JURI RAUS

Civil No. 15952

May 13, 1966

TRANSCRIPT OF PROCEEDINGS

FRANCIS T. OWENS
Official Reporter
514 Post Office Building
BALTIMORE 2, MARYLAND
SAratoga 7-7126

Approved For Release 2005/01/27 : CIA-RDP75-00770R000100100001-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

- - -

EERIK HEINE :

vs. : Civil No. 15952

JURI RAUS :

- - - - - - - - - - - - - - - :

Baltimore, Maryland
Friday, May 13, 1966

The above-entitled matter came on for hearing before His Honor, Roszel C. Thomsen, Chief Judge, at three o'clock a.m.

APPEARANCES

For the Plaintiff:

MR. ERNEST C. RASKAUSKAS
MR. ROBERT J. STANFORD

For the Defendant:

MR. PAUL R. CONNOLLY
MR. E. BARRETT PRETTYMAN, JR.

Also present representing the United States Government, Mr. Thomas J. Kenney, United States Attorney; Mr. Kevin T. Maroney, Attorney, Department of Justice; Mr. Lawrence R. Houston, General Counsel, Central Intelligence Agency.

PROCEEDINGS

- - -

MR. CONNOLLY: Your Honor, with respect to why we were waiting, I think an explanation has been made to you by Mr. Kenney.

THE COURT: Well, are you ready to go ahead?

MR. CONNOLLY: Yes, Your Honor.

THE COURT: I think the first thing to do since I understand we are now going to hear argument on the motion for summary judgment filed by the defendant is to know exactly what is the record in this case.

Here are some papers that were filed this morning, I gather, May 13th, two new affidavits.

Have you seen them before?

MR. CONNOLLY: I just saw them within the last three or four minutes, Your Honor, just before we started.

THE COURT: I thought they had been served.

MR. RASKAUSKAS: No, Your Honor. I suggested that I was going to serve them when I saw Mr. Connolly in court.

THE COURT: I thought you said you had served them?

MR. RASKAUSKAS: No.

THE COURT: Well, maybe you better read them.

MR. CONNOLLY: I have very quickly.

In order to save time, Your Honor, my first reading made me think that they were intended to try to raise a dispute of fact on the basis that both of these people quote Allikas and Keerd quote, I think Mr. Raus is saying the information came from the Federal Bureau of Investigation.

THE COURT: That is right.

MR. CONNOLLY: Is there anything other than these affidavits that you care to rely on as to this motion, in other words?

MR. RASKAUSKAS: No. They are cumulative to the one that is in the file filed by Mr. Kuklane, except one of these is the one from Mr. Allikas which refers to the minutes of the meeting.

THE COURT: The one that has the minutes of the meeting?

MR. CONNOLLY: Yes, alleged copy of the minutes.

I understand, although it is not important, I understand that there are two sets of minutes kept by this New York Branch.

THE COURT: Well, do you want to put both sets in?

MR. CONNOLLY: I do not have them here.

THE COURT: Well, it would not make any difference whether they are for the summary judgment.

MR. CONNOLLY: No, I do not think it is that important.

THE COURT: So far as summary judgment is concerned as any disputed questions of fact must be resolved against you.

MR. CONNOLLY: Correct, sir.

THE COURT: So we have to limit it for the sake of the motion for summary judgment to that.

Now, this file is getting fairly thick and I would like to be sure just what the parties feel is before the Court for decision here. Certainly the complaint is.

Let's make a list just to be sure because there are some memoranda which have exhibits attached to the memoranda. It is my understanding those exhibits are not before the Court, something attached to an unsworn memorandum.

You all filed an unsworn memoranda which has some exhibits attached and I did not know whether you thought you were bringing them before the Court or not, and I think you had better be sure, and that is one of these things, and I wanted to get it clarified as to what is before the Court and what is not before the Court.

MR. RASKAUSKAS: Well, may I address myself

to that point, Your Honor?

THE COURT: Yes.

MR. RASKAUSKAS: Under Rule 56, as I understand it, the Court may consider all material. I can submit it to the Court, and I do not think there is any stricture in the rules which requires each and every exhibit to be under oath.

THE COURT: Well, the exhibit does not have to be under oath, but I mean it has to be vouched for. Some of them have to be vouched for by somebody, and there may not be any dispute about the materials which are attached to your papers, and the Court can consider them without having to wait.

It says:

"The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with an affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Now, the ruling in every circuit, I think except the Third Circuit, and maybe they have gotten in line recently is that the allegations of pleading are not sufficient to overcome an affidavit, I mean an ordinary unsworn pleading.

MR. CONNOLLY: Your Honor, is that Subsection (e) of Rule 56?

THE COURT: Yes.

MR. CONNOLLY: Which I think is just contrary to what Mr. Raskauskas just represented.

THE COURT: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify, and so forth, sworn or certified copies of all papers or parts thereof shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions."

Well, certainly the answer, the complaint and the answer are before the Court, and then there are a great many motions for the taking of depositions and so forth, which do not seem to have any real materiality except the deposition of the defendant Raus which was taken.

There are some memoranda, and of course so far as they still deal with matters which are before the Court on pleadings I will consider all of the memoranda.

There is a statement, or there is a memorandum filed by the defendant in January '65 together with Raus' affidavit.

Now, do the plaintiffs want that affidavit in?

MR. RASKAUSKAS: Very definitely.

THE COURT: You want that and the position papers in that affidavit to be considered. So that the memorandum of the 19th of January 1965 and the Raus affidavit are to be considered as before me.

MR. CONNOLLY: The memorandum would not be, would it, Your Honor? That is not sworn to.

THE COURT: The memorandum is not but the affidavit is.

MR. CONNOLLY: The affidavit is.

THE COURT: Well, let's say that the Raus affidavit with the memorandum on January 19th.

Then there is a stipulation that does not have much to do with it. There are interrogatories which have never been answered. The interrogatories have not been answered.

MR. STANFORD: No, we received no answers, Your Honor.

THE COURT: I gather that for the purpose of this motion for summary judgment, they are based entirely on the point of privilege. You have gone as far as you can practically go under the Court's ruling in the deposition of Raus; is that right?

MR. STANFORD: Your Honor, we do not hold that

the sole consideration here is the Barr v. Matteo doctrine. We say that there are genuine issues of fact which would be outside the purview of that governmental immunity doctrine.

THE COURT: I understand that, but I mean, you are satisfied to go ahead with the motion for summary judgment today without pressing further for answers to interrogatories?

MR. STANFORD: Yes, Your Honor, we are.

THE COURT: All right.

MR. STANFORD: This does not mean that we are waiving the answers to those interrogatories. We think it is improper, but we think that the Government has taken a stand whereby they will not respond to the interrogatories. So that they have in effect--

THE COURT: So that in effect it is the same point that stops the--

MR. STANFORD: That stopped the deposition of Mr. Raus.

THE COURT: That stopped the deposition of Raus, that would stop any interrogatories that would help you?

MR. STANFORD: Yes, sir.

THE COURT: That is what I meant that one ruling covers in effect both of them. All right.

Then there are three, I think, affidavits of

Mr. Helms. I think there are three, aren't there?

MR. CONNOLLY: Yes, Your Honor.

THE COURT: In which there is the formal claim of privilege. Then there is this memorandum of points of the defendant, which I take it is just a brief. Then there is a memorandum of the plaintiff in opposition to it, which again is just a brief, I believe. I do not belittle briefs, but it has not got evidence.

Then you have along with it the affidavit of August Kuklane. That is to be before the Court. Is that right?

MR. STANFORD: Yes, Your Honor.

THE COURT: The affidavit of Kuklane. Then attached to that are these other documents which have not been sworn to but are filed by the defendant.

Are these before the Court in some way?

The April 28, 1965 letter from Prettyman to Raskauskas. The letter--I do not see the date. It must be the--

MR. CONNOLLY: From Tammark.

THE COURT: From Tammark?

MR. CONNOLLY: Tammark.

THE COURT: To Raskauskas, and the letter from Collins to the Court.

Are they supposed to be before me now? Does

either side think that these are before me?

MR. RASKAUSKAS: Yes, Your Honor. I take the position that documentary and other evidentiary material, which these letters are, may be considered by the Court on a hearing for summary judgment, and I rely on Moore here.

THE COURT: What did he say?

MR. RASKAUSKAS: It says, materials on which motion may be heard. The material which the Court is entitled to consider on a motion for summary judgment are the pleadings, affidavits, which meet the testimonial requirements of Rule 56(e), depositions, anawers to interrogatories, Rule 56(e) as amended in '53, admissions, oral testimony, documentary and other evidentiary materials. The Court shall also consider facts which are the subject of judicial notice, and the same reasons that warrant their use at trial warrant their use at the summary judgment hearing.

THE COURT: Well, I do not understand that that means that affidavits must have all these protections and just because you put it, somebody puts it in a letter that it automatically becomes evidence without being sworn to. That does not make sense to me.

I have never understood that to be the law, and I do not understand that Mr. Moore says so.

I see your point. He says something about documentary and other evidentiary material. I think that was the word, wasn't it? It does not say that just a letter is admitted or can be considered as being proof of the facts stated in it.

Now, it may be quite possible to get this in or stipulate it in, to either stipulate it in today for whatever purpose it is wanted or to find some way perhaps to get supplementary affidavits so that we will not be doing this thing piece by piece.

I want to get the record complete so that when I do make a ruling one way or the other I will have the whole thing and will not have to go back and do it again because in your supplemental memorandum of points you have a letter from Mr. Hoover of the FBI to Raus. I do not doubt, they seem to be copies, and they look like copies of the letterhead, and some other correspondence.

It may be that they can be stipulated as to competency as though there were objections as to relevancy and materiality on the issues raised.

Can something be done on that? I want to know what I am to consider and what I am not to consider.

I believe this stuff is in two lots: One, the material attached to the first memorandum of the plaintiff and the other material attached to the second.

MR. CONNOLLY: When you say my position, for the record, so that we will know what we are dealing with, I would object to the three documents which Your Honor has described, the letter from Barrett Prettyman to Mr. Raskauskas.

THE COURT: Let's take them one at a time. These are the papers attached to Document No. 13. Now, the first one is the letter from Mr. Prettyman to Mr. Raskauskas. I do not suppose there is any question of competency.

MR. CONNOLLY: No, it is completely immaterial to the issues. That is what I am saying.

THE COURT: Well, do you want that considered? I have not read it. You want that considered?

MR. RASKAUSKAS: Yes, Your Honor, and without belaboring the point, to restate our position, these are exhibits which tend to show to the Court that there are genuine issues of fact. Now, at the trial we will have the original documents duly authenticated.

THE COURT: Well, there is no question--

MR. RASKAUSKAS: Proven and put into evidence.

THE COURT: Well, there is no question of authentication. You do not need an authentication of a photostat or a Xerox copy, or whatever it is, of Mr.

Prettyman's letter to you. He certainly admits that this is a copy of his letter, and it is his calling on you for something, and I suppose it might be evidence on your claim of waiver.

He asked you to produce certain things, and if you say you waived it, this might be evidence on that point.

Now, as to this document, the letter of 28 April '65 I would say, you object to it on relevancy and materiality.

MR. CONNOLLY: Your Honor, and also because I think it also requires an explanation. Just to leave it stay there unexplained, and the circumstances under which the letter was sent, I think it is misleading.

THE COURT: Well, I think if they want it in, if they have been operating under a mistaken theory of the law of what may be considered on motion for summary judgment I would not want to hold them to that, and I think we ought to try to get them in.

I mean if Mr. Raskauskas thinks or has thought that just by attaching this to his memorandum it became admissible to be considered, that something must be considered on a motion for summary judgment I certainly would not want him foreclosed from any benefit he may have of it by not having it part of a document which was sworn

to.

MR. RASKAUSKAS: May I say one thing which may clear this up, Your Honor, from our point of view? The letter and the documents, with respect to them we take the position the Court is not going to weigh these as to credibility.

THE COURT: That is right.

MR. RASKAUSKAS: As evidence. The Court will consider these exhibits to determine whether or not there is an issue of fact that must go to trial.

THE COURT: Well, I know but you do not consider that in the law unless it is presented to the Court in some proper manner. Even alleging it in your complaint or the defendants alleging it in their answer is not something which can overcome an affidavit according to the rule, as I say, I believe of every Circuit except the Third Circuit.

MR. CONNOLLY: Your Honor, I would have no objection to it going in providing Mr. Raskauskas would agree that the letter was a letter sent to him prompting him to give us information which he promised to give us during the course of Mr. Heine's deposition; and two, that the information which was called for in the letter, and which he promised to furnish in the course of Mr. Heine's deposition, had not indeed been furnished.

MR. RASKAUSKAS: I never promised Mr. Connolly anything, and if we have the original copy of the deposition we can look at it. I said I would informally submit these materials, and we did. We looked around. We could not find my client's war medals because he was in three Soviet camps. He did not carry them around, and that is why I did not give them to Mr. Prettyman.

MR. CONNOLLY: Well, that being so, Your Honor, I think Mr. Raskauskas will have to proceed as best he knows how to prove the matter.

MR. RASKAUSKAS: I can do that.

THE COURT: Well, all right. It does not seem to me that that is--

MR. CONNOLLY: Material.

THE COURT: On the question of materiality on this present issue.

The point that does seem to me to have some basis on the issue of waiver is that the deposition, Heine's deposition was taken, and certain material was requested, and certain material was supplied, and if some material has not been supplied it is not before me now or why it was not. So I think we can dispose of that letter in that way.

Now, the next one is a letter which is from a man named Tammark to Mr. Raskauskas.

Now, what purpose is this letter--I have not

read it. I may have read it at one time. I have not read it recently.

For what purpose do you want the Court to consider that letter?

MR. RASKAUSKAS: Well, the purpose we are going to ask the Court to consider that letter is that a man by the name of Mr. LaVenia that went out and saw Mr. Tammark and told him that he has interviewed thirty-three people around this country and Canada, and we attempted to depose Mr. LaVenia the other day, and I understand from the reporter that he wanted to read and sign his deposition, and it is not filed with the Court.

I have a copy of it here, and we learn now that this man is associate counsel in this case. He has been retained by Mr. Connolly. This Mr. LaVenia is the same man that while we were taking the deposition of Mr. Heine here was up at Mrs. Heine's house trying to get into her house to see her.

So we think it is very relevant.

THE COURT: Well, then, you ought to have it sworn to to be before me. I can't just take a letter to you from a man named Tammark as proof of facts in a case.

I do not know. In the first place I do not know whether it is really a letter from him or not. There is nothing, just that a man is out in Wisconsin, and he

writes you a letter or purports to be a man in Wisconsin, and he writes you a letter.

Now, no doubt he did, but I do not understand that that is material which can be considered on a motion for summary judgment apart from some sort of a stipulation waiving competency.

Now, if Mr. Connolly will agree that it can be considered to the same extent as if it was sworn to as an affidavit for summary judgment without waiving his right to have the opportunity to cross-examine the man before it might be considered on the merits, that would help to expedite matters.

MR. CONNOLLY: I will not, sir.

MR. STANFORD: We ask then, Your Honor, that it be considered as if it was sworn to and based, of course, upon the fact that we will submit within as short a time as possible that same letter in affidavit form.

THE COURT: You will supplement it with an affidavit?

MR. STANFORD: Yes, sir.

THE COURT: And I will assume that you will.

MR. STANFORD: Yes, sir, and if that is done, well, of course, then we have to proceed further.

THE COURT: Yes, that is the practical way. Mr. Tammark to be supported by affidavit.

MR. RASKAUSKAS: In view of that, Your Honor, I request that the Court strike all statements and testimony, unsworn testimony, given by the various counsel from the floor, including Mr. Houston's testimony the last time that Raus was paid directly and indirectly.

THE COURT: I thought that was accepted in lieu of testimony. Those statements were accepted.

Well, let's see. Is Mr. Houston here. All right. Let Mr. Houston come on and take oath, if he will, that those statements are true.

We are not accustomed to requiring that in this Court, but counsel frequently make statements of fact which are accepted by counsel, other counsel to the same extent as if they were testimony, with the understanding that they can be cross-examined, but if you want to have that fact--

MR. RASKAUSKAS: Well, Your Honor, my objection last time was that it was not susceptible to cross-examination. I was asking Mr. Raus these questions. It has nothing to do with Mr. Houston's credibility. It is the fact that a gratuitous statement was made in this Court, and I was precluded from any inquiry.

THE COURT: No. I thought you accepted the fact of how he was paid. That is, there was certain testimony made as to his being paid.

MR. RASKAUSKAS: I accepted the fact, Your Honor, that Your Honor made the request if we required the solemnity of an oath to use this more or less as an addendum to Mr. Helms' third affidavit rather than to ask Mr. Helms to come up with a fourth affidavit, and I said we make all of our objections other than requiring that this be sworn to.

THE COURT: All right.

MR. RASKAUSKAS: Now, I do not require that it be sworn to today either; but my position is that it should not be considered.

I am only asking the Court not to consider any of these matters that we have not had a shot at in cross-examination on either.

THE COURT: Well, you want me to consider your affidavits. I am not quite clear what point this is. Mr. Helms has made certain affidavits as to what people were told.

You question his veracity; is that it?

MR. RASKAUSKAS: I am not making any comment on his veracity. Our position is that the affidavits are conclusory suppositions.

THE COURT: Well, all right. They are perfectly good points. They are perfectly good points that you make, that they do not tend to prove it, but then

you get into a question of how he was--

MR. CONNOLLY: Can I refresh Your Honor's recollection?

THE COURT: I thought the matter had been worked out in a way that the statement was accepted as the equivalent of an affidavit.

MR. CONNOLLY: May I refresh your recollection? It is page 41 of the transcript, Your Honor, or rather excuse me, 47 .

(Transcript was handed to the Court.)

THE COURT: Well, I understand. The point was made that they had no right to say what was secret or what was not secret.

Now, has the Government concluded that it is asserting that Raus was paid but will not say how he was paid? I just do not understand that whether he was on the--you have disclosed that he was acting as your agent, so I do not understand, and you are saying that he was paid, and there is some other testimony as to what he was paid, and there was no objection to his saying that he got certain amounts from the Bureau of Public Roads and he got certain amounts from his Army service.

Why should not the Government say, if you say he was paid for what he was doing, why shouldn't you--if you are willing to stand on the point whether he was paid or not

is immaterial, whether he was paid or not for services on behalf of the CIA, then I will have a clean question to decide, and if you decline to say whether he was paid, then you will just have to stand on the basis and the Court will assume that that fact is disputed.

I think you can claim privilege but I do not see how you can make statements of fact like that and say, "We will go up to this point and then stop."

MR. MARONEY: Well, Your Honor, the statement was made to that point only in response to an inquiry as to whether or not that could be made, that statement could be made on the record, as I understand it.

THE COURT: Well, you say can be made. Well, I am doubtful whether I can accept it because if he was paid through another agent, if he was given something by another agent, I can see that you are entitled to the privilege.

If he was paid, if you say he was paid through the Bureau of Public Roads it seems to me that is between you and Congress and Comptroller General. I do not see why it is a matter of privilege. I do not see how there can be any privilege.

MR. MARONEY: As I understand it, Your Honor, the method of payment, Mr. Houston advises me that the method of payment has classified aspects, and we are unwilling to go beyond the statement previously made, that

from the executive privilege standpoint the Government is forced to take that position.

THE COURT: The benefit of privilege. The method of payment has some classified aspects.

MR. CONNOLLY: Your Honor, 403 g gives the answer.

THE COURT: "In the interests of the security of the foreign intelligence activities"--50 United States Code, Section 403 g.

"In the interests of the security of the foreign intelligence activities of the United States and in order to further implement the proviso of Section 403 (d) (3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of Section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: Provided, that in furtherance of this section, the Director of the Bureau of the Budget shall make no reports to the Congress in connection with the Agency under Section 947 (b) of Title 5."

That is what I guess this morning's paper is talking about, isn't it? That Congress, that one of the Senators was a little disturbed about some of those people.

Well, I am not sure that it applies. It may or may not; but when you say that he was paid, that you are willing to say that he was paid but are not willing to say whether he was paid by your Agency or by some other agency.

MR. MARONEY: That is right or the method of payment.

THE COURT: Or the method of payment. Then I suppose I have a minor question to decide as to whether I can consider your statement that he was paid because it is not subject to cross-examination.

I am not sure that is fatal to the defendant's position, but I have got to decide whether it can be considered or not.

As I understand it, they will not go any further so I think the issue is sharply drawn, and it is a point for decision.

MR. CONNOLLY: To refresh Your Honor's recollection a little bit further, you will also recall that Mr. Raus testified to that also under oath; so to the extent that an oath is missing it was supplied by Mr. Raus, the same language that Mr. Houston alluded to.

THE COURT: That he was paid directly.

MR. CONNOLLY: Directly or indirectly.

THE COURT: Yes.

MR. RASKAUSKAS: I do not remember that.

MR. CONNOLLY: Yes, Your Honor. I will be happy to show you if I can.

THE COURT: All right, show it to me.

MR. PRETTYMAN: That is at transcript 51 and 52.

MR. CONNOLLY: "You heard what Mr. Houston said."

Mr. Raus said, "Yes, sir.

"The Court: Is that true?

"The Witness: Yes, Your Honor."

THE COURT: Who asked the question?

MR. CONNOLLY: You did, Your Honor.

THE COURT: I can't blame the plaintiff's lawyers for that then.

MR. CONNOLLY: "All right, the question is, well, in view of the instructions they have given him that he was paid indirectly by CIA during the time in question I will allow since CIA said it, you may ask him if that is--since Mr. Houston has said it, you may ask the defendant if that is true and just let him answer yes or no.

"The Court: You heard what Mr. Houston said.

"The Witness: Yes, sir.

"The Court: Is that true?

"The Witness: Yes, Your Honor."

THE COURT: Did I ask the question? I said I thought they might ask.

MR. RASKAUSKAS: No, sir, Your Honor asked that and then Your Honor advised me:

"You understand I am giving you your exception? You have exceptions without taking them."

And I said, "Yes, Your Honor," but we objected right along the line.

THE COURT: With respect to being able to go further.

MR. RASKAUSKAS: Yes, Your Honor.

THE COURT: I understand. The thing is, did you adopt the Court's question or not? Up to that point did you want that much?

MR. RASKAUSKAS: No, we did not. Now, we did not want that. We objected to that.

THE COURT: I think you should not be held to adopting the Court's question.

MR. CONNOLLY: I adopt it.

THE COURT: What is that?

MR. CONNOLLY: I adopt it.

THE COURT: Well, I have got to rule then

whether without cross-examination--

MR. CONNOLLY: Well, you see I would have had the right of cross-examination, Your Honor. I did not put that question since it was already in the record.

THE COURT: Well, you could not have gotten that, but you would have had the same objection because they will not let him say how.

MR. CONNOLLY: Yes, but I want to go that far, Your Honor.

THE COURT: Yes.

MR. CONNOLLY: I want to go that far.

THE COURT: All right.

MR. RASKAUSKAS: Or he could put in a fifth affidavit of Mr. Helms.

MR. CONNOLLY: I do not have to because under the rules I can use any part of a deposition. If you do not take all of it, if you leave out a part which I am entitled under the rules to use, I can use the part that you do not use, and if you do not care to use it, if you do not care to use this language on page 51 and 52, I do.

THE COURT: Well, on summary judgment I can consider whatever the Court feels is proper, and I will indicate when I have considered something in over objection it will mean that I have overruled the objection.

I do not know how many of those occasions

there will be, but you will have your points at any rate.

All right. Then, there is this Tammark business.

Then, there is a letter from Jeremiah C. Collins to the Court.

What is the point about that?

MR. RASKAUSKAS: That was on a question of good faith, Your Honor, where they asked that this case not be called for trial. Mr. Collins of the firm of Hogan & Hartson wrote a letter to the Court explaining that they had to answer all these interrogatories, and so on and so forth, and then subsequently about a month after that letter they came up with this new defense and never answered the interrogatories.

So we feel that letter is very relevant on the question of good faith.

THE COURT: Well, then, its relevancy and immateriality is objected to, and you are not objecting to the competency of Collins?

MR. CONNOLLY: No, Your Honor, and in order to sharpen the issue before the Court if Mr. Raskauskas wants that portion of Mr. Tammark's letter in which it says that Mr. LaVenia told Mr. Tammark that he talked to thirty-three witnesses all over the United States and Canada I do not have any objection to that going in; but I do have the

objection of a lot of conclusions and self-serving matters that Mr. Tammark has in his letter which even if it was under oath would not be admissible.

THE COURT: It might not be admissible but it might be enough because he says it is a question of relevancy and materiality.

MR. CONNOLLY: And competency there, Your Honor. For example, a man who draws opinions and conclusions which he is not permitted to give an opinion or conclusion as to what Mr. Heine is or is not even if he were here on the witness stand, he would not be permitted to do that.

THE COURT: Well, what you are saying is that so far as the position is concerned the Court has to assume that he was slandered, don't I, for the purpose of this motion?

MR. CONNOLLY: Yes.

THE COURT: I have to assume the truth of the plaintiff's claim.

MR. CONNOLLY: Correct.

THE COURT: The truth of the statements for the purpose of this motion for summary judgment.

"Shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Of course, I will have to pass on when this

letter is turned into an affidavit, what Mr. Connolly is saying, whether it is a letter or whether it is an affidavit, it must meet the test of (e).

Well, I will just have to pick and choose of what is properly admissible and what I consider relevant and material on any issue that is to be an issue in the case at this time.

Then some more points and authorities, and then this affidavit and the question of little difficulties between counsel.

MR. RASKAUSKAS: That is not relevant to the motion, Your Honor.

THE COURT: I do not think so at the moment.

MR. CONNOLLY: I suggest the motion and the motion to amend the amended answer, Your Honor.

THE COURT: Where is that? What was the date of that? Do you have that?

Well, here is a motion to amend the answer.

MR. CONNOLLY: Yes.

Yes, and your order permitting it.

THE COURT: And the order.

MR. CONNOLLY: The order is dated March 21st.

THE COURT: Yes.

MR. CONNOLLY: I am not sure it was dated March 21st, but it was mailed March 21st.

THE COURT: Yes. Then, there is Mr. Helms' affidavit based on the papers attached to them, and I guess the motion for a protective order, and that is as far as it may have any bearing on it, and then another affidavit from Mr. Helms and the amended answer.

Then, the supplementary memorandum of points and authorities in opposition to defendant's motion for summary judgment.

Now, that is argument again except that there is attached to that these various letters.

MR. CONNOLLY: What letter are you speaking of?

THE COURT: I think there are five letters. First there is the letter of 18th of December '63 from Hoover to Landra.

MR. RASKAUSKAS: Your Honor, that is already testified to in the deposition of Mr. Heine, and I think Mr. Connolly will agree to that.

THE COURT: Well, you need not worry about it. I do not suppose there is any question of competency.

MR. CONNOLLY: There is a document, a very material document that is missing, namely, the letter which prompted this reply; and if Mr. Raskauskas will supply that then I have no objection.

MR. RASKAUSKAS: Mr. Landra's letter? I think

I have that. I will look for it, Your Honor. I am quite sure I have it, and it was identified as an exhibit in the deposition, if I am not mistaken.

THE COURT: Well, you would add, it is agreeable if Landra's letter to Hoover is included?

All right.

MR. CONNOLLY: Also, Your Honor, I did not know we were getting into this, but we also have a letter from Mr. Hoover to Mr. Raus.

THE COURT: Yes.

MR. CONNOLLY: Two of them.

THE COURT: Yes.

MR. CONNOLLY: I do not think I have Mr. Raus' letter that prompted that reply. I have no objection if the Raus letter which went to Mr. Hoover to which the Hoover letter purports to be a reply was also put in evidence.

THE COURT: Do you have that?

MR. CONNOLLY: I do not have it with me, Your Honor. I can get it, and I had no idea we were to take up these matters because like you I did not think these were before the Court, and I really do not think they have any materiality whatsoever to this motion.

And so I do not suggest that Your Honor delay consideration of the motion on account of it.

THE COURT: If they can be stipulated and

added, I think I want to get the record complete and not have a motion for reconsideration by one side or the other because something was not included that should have been included. I want to try to clean it up.

Now, then, the letter of May 10, '63 from Hoover to Raus.

MR. CONNOLLY: Do I have an agreement from Mr. Raskauskas, Your Honor?

THE COURT: You mean on these other two letters that you are going to supply one letter and he is going to supply one letter to round out the correspondence; is that it?

MR. CONNOLLY: Well, I said that I would be willing to accept these as part of the record if Mr. Raskauskas would agree that that may be done. I have not heard his response to that.

MR. STANFORD: We will agree to that, Your Honor.

THE COURT: All right. That is fine. Then, this letter of the 10th--I am not clear what materiality this letter to Hoover--

MR. RASKAUSKAS: Well, we think it is relevant on the question of a purported CIA dispatch operative writing letters to Mr. Hoover asking him about whether he gives clearances or nonclearances, and we are

very interested in seeing that letter. That was Mr. Hoover's response.

THE COURT: That is a letter of April 6, '64.

MR. RASKAUSKAS: Yes.

THE COURT: He is talking about the one in which they talk about "Masters of Deceit."

MR. RASKAUSKAS: Yes.

THE COURT: I did not see the point of it when I read it.

MR. RASKAUSKAS: With respect to the relevancy to the April '63 letter?

THE COURT: No, no. No, I am not talking about that. That is a different one.

MR. RASKAUSKAS: Of the May '63 letter?

THE COURT: Yes, the May '63 letter. Well, you know what it is.

MR. RASKAUSKAS: Yes, I remember it. That is the one from Mr. Hoover discussing his book.

THE COURT: Yes, that is right.

MR. RASKAUSKAS: On communism.

THE COURT: That is right.

MR. RASKAUSKAS: Well, we thought at the time and still think that some facts can be developed to show that perhaps Raus was trying to make a contact to be used by the FBI and got turned down.

THE COURT: I do not see the materiality of that on this present motion. There is no doubt I gather that this letter--do you know what this letter is?

MR. CONNOLLY: You mean the one where he talked about--

THE COURT: Yes, Mr. Hoover--

MR. CONNOLLY: The complimentary letter?

THE COURT: No, I have not got the complimentary letter, but we have Mr. Hoover's reply, which is certainly no secret.

MR. CONNOLLY: Certainly; no objection to that.

THE COURT: Now, the next is a letter--I am not clear what it is. This is from Meeme Malgi. Is that it?

MR. STANFORD: Meeme Malgi, I think it is.

THE COURT: Meeme Malgi. What is it? What is it about? In the first place it is practically illegible, and does it have any materiality?

MR. RASKAUSKAS: There is a translation with it, Your Honor.

THE COURT: No, I do not mean the one, I do not mean the one in Estonian, but I mean the one in--

MR. RASKAUSKAS: The letter of transmittal.

THE COURT: I guess that is just a letter of

transmittal.

MR. RASKAUSKAS: That letter of transmittal is not relevant, Your Honor.

THE COURT: Well, I do not think it makes any difference except it vouches for--does Mr. Raus deny that he sent this letter?

MR. CONNOLLY: I have not taken it up with him, Your Honor. I do not know the accuracy of the translation, sir; so I must interpose an objection.

THE COURT: You say you are?

MR. CONNOLLY: Yes, sir.

THE COURT: Well, why not? Isn't he here?

MR. CONNOLLY: No, sir.

THE COURT: Well, why don't we find out? I mean, they can turn that into an affidavit if it was received, but I certainly would allow him to say, to be asked whether he sent this letter.

MR. CONNOLLY: Certainly I question the translation, Your Honor. I can't vouche for the accuracy of the translation.

THE COURT: Well, if he is available why don't you check with him, and if the translation is accurate we can consider it for what it is worth?

MR. CONNOLLY: And I will be happy to get him to provide his own translation.

THE COURT: All right, provide his own translation, and we will have two and if I feel it is of sufficient importance I will pick a neutral translator. I may not think it is sufficiently important, and there may not be that much difference between the two versions.

All right. This is the letter of Raus--well, the letter is just addressed to "comrade." It is not addressed to anybody.

At any rate, it is a question of sending a letter to "comrade" and I suppose that is the question, and that is where the letter comes from because otherwise it does not say to whom it was written.

Now, then, we have the claim of privilege, and the supplemental memorandum of the defendant, which again is argument.

There is the deposition of Raus. The deposition of Heine is not before me, the plaintiff.

The deposition which the defendant took of Heine has not been filed.

MR. RASKAUSKAS: Yes, Your Honor.

THE COURT: Has it been filed with the Court? Is that supposed to be before me?

MR. RASKAUSKAS: Yes, Your Honor. That is 924 pages of testimony.

THE COURT: I am supposed to read that as part

of the motion for summary judgment? Will you point out the portions that you want me to read, that you are relying on or that you feel are important so that I do not get bogged down?

MR. STANFORD: I think that they will be brought out during the hearing, Your Honor.

THE COURT: All right.

MR. STANFORD: And I think that we can point out at a later time the specific areas if we reach that today.

THE COURT: All right.

Then, there is this letter or notice of the taking of the deposition of LaVenia. Is LaVenia's deposition to be before the Court?

MR. RASKAUSKAS: Well, it has been unsigned, Your Honor, and I understand from Mr. Connolly that he wants to read it and sign it.

MR. CONNOLLY: He is right.

THE COURT: Well, I say, once that has been done, is it to be considered before the Court at this time on the motion or is it not to be considered before the Court on the motion?

MR. CONNOLLY: I am at a loss to understand what possible relevancy there is in that deposition. The man said he had no knowledge whatsoever as to whether Mr.

Raus was working for CIA or was not working for CIA.

THE COURT: Well, I do not know since I have not seen it I have even less idea of what relevancy it may have.

Does either side want me to consider it?

MR. RASKAUSKAS: Yes, Your Honor.

THE COURT: Well, then, we will have to wait until he has signed it and it has gotten sent in. The deposition of LaVenia--

MR. CONNOLLY: I hope during the course of these remarks Mr. Raskauskas would illuminate for all our benefit just how that deposition becomes material.

MR. RASKAUSKAS: I will be delighted to do that.

THE COURT: All right.

Then, we have the notice which was filed on the 3rd of May by Mr. Raskauskas and Mr. Stanford stating that they were going to take some procedures in accordance with Section 16 of Executive Order No. 10501.

I understand that whatever was done--well, suppose you make your statement on that. Is that to be before me or to be considered by me?

MR. STANFORD: No, Your Honor, that is not to be considered by the Court on this motion.

THE COURT: All right, and then these two

new affidavits are to be considered.

MR. STANFORD: Yes, Your Honor.

THE COURT: And the minutes attached to it are part of the affidavit. Now, does the defendant want to--the defendant said that they had another version of the minutes, but I do not see that you gain anything by putting it in.

MR. CONNOLLY: No, sir.

THE COURT: Well, we seem to have accumulated a record. That is about all we have done so far. I think we understand now what is before the Court.

Does anybody want to put anything else in the record?

MR. STANFORD: Not at this time, Your Honor. I do not think we could add anything to what has been presented.

THE COURT: Do the defendants want to put anything in?

MR. CONNOLLY: Nothing, Your Honor, other than the two documents I said I wanted.

MR. RASKAUSKAS: What?

MR. CONNOLLY: The two letters.

THE COURT: Well, we get down then, I suppose, now to something between the plaintiff and the defendant.

Does the Government have anything more it

wishes to say?

MR. MARONEY: No, Your Honor. We have no-- we are not here in the role of advocating the motion on behalf of the defendant. I think it should be made clear that our role has been limited to being here for the purpose of authenticating, so to speak, the affidavits which have been submitted on behalf of CIA and also to represent the CIA in connection with the claim of executive privilege, and, of course, we have taken no position with respect to the merits of the motion pending.

THE COURT: That is right.

Well, I think it would be well to have a clarification at this time now that we know what the record is, exactly what points each side is making.

The defendant is making a motion for summary judgment, but the motion was made before, or the motion originally was made before claim of privilege was put in; so some of the argument about the insufficiency of the claim of privilege has probably been washed out. Now, however, the claim has been made by the Government, and some of the things we have said are no longer--

MR. STANFORD: Some of the things have been removed, Your Honor, but we believe that there are still many defects in form which we will bring out.

THE COURT: All right. Now, you have not

filed anything since the claim of privilege by the Government. Do you have a brief with you today that you are going to file or you say there are still some defects that you will bring out? Is this to be done entirely orally or what?

MR. RASKAUSKAS: Yes, Your Honor. I anticipated that we would proceed today with counsel for the defendant arguing their motion, and then Mr. Stanford and myself would respond to it.

I believe in the course of my response I expect to make a speaking motion under the rules, and if Your Honor cares to consider the motion in that fashion I think that we can have a more orderly procedure.

THE COURT: You mean to let them argue first and you make a speaking motion as part of the argument? Why not have the whole motion first and let's see where we are?

MR. RASKAUSKAS: Then I will just say briefly and I will argue the motion later, but I would like to make a speaking motion at this time under Rule 56(f), and I would like to read the salient part of the rule:

"When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition,

the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Now, I did not think it was necessary to file a motion and affidavit under 56 (f), bring them to the attention of the Court where the information is not available because as the Court observed this because of the peculiar circumstances of this case.

When Mr. Raus gave his deposition here in open court, I think the Court can take notice of the fact that we are very strictly proscribed in the area, the factual area, that we want to develop.

So we are asking not for more time to get affidavits or to take depositions but we are asking under the last part of that rule that the Court make such other order as is just, and that order, we are moving, is to have as full and complete a hearing on the matters, particularly this first defense of official immunity, in as full a trial as is possible; that in cases, and there are many authorities which we can cite, when the crucial facts are largely within the knowledge or control of the moving parties, and the plaintiff does not have the opportunity for cross-examination, the Court does not have the opportunity to observe the demeanor of witnesses, in cases

where there are great and complex legal questions involved, it is a sounder policy to permit the matter to go to trial so that as many possible facts as can be developed are brought out.

So we think that this is an appropriate application of Rule 56 (f), that the Court enter an order denying the motion for summary judgment and permitting this matter to go to trial so that all possible facts in this case can be developed and that so these affidavits which have been submitted, that we may have the witness and place these statements in the crucible of cross-examination and see what can be developed in the interest of arriving at the truth.

THE COURT: Well, let's see. What do you understand the issues to be here? The Government has certainly claimed privilege or the Government has asserted its privilege, has it not?

MR. RASKAUSKAS: Yes, sir.

THE COURT: Now, if the Government has asserted its privilege, the question is, where do we go from there, or what remains open?

MR. STANFORD: Your Honor, we feel that that particular area does not have any effect whatsoever on Rule 56, and we feel that the proper procedure in this case would be to have the defendant in this case, who is the

moveant with regard to summary judgment, state the points for his motion, to state the points for his argument, and we will meet or answer the points that he brings up on the objections which we have set forth in our memorandum.

THE COURT: Well, do you have any new brief or not?

MR. CONNOLLY: No, Your Honor, I tried as best I know how to state my position precisely and simply in the supplemental memorandum which was filed at the time of the last hearing.

THE COURT: Well, how long do you want? It is now four o'clock. How long does each side want to argue?

MR. CONNOLLY: I think I can state my opening position in fifteen minutes.

THE COURT: All right. We had a very long hearing this morning. The question is whether we could do any better, to let each side state its position and then supplement it with written memoranda. I would like to know each side's position, at least to get that part of it, which may or may not produce the need for some further development by brief.

MR. CONNOLLY: I take it, Your Honor, that Mr. Raskauskas and Mr. Stanford really do not dispute Barr vs. Matteo and Howard vs. Lyons. As I understand their position, and I am presenting this just to find out how far we can

simplify the argument, as I understand their position they say that it is the burden of the moveant in this case, Juri Raus, to produce facts which would bring him within the doctrine of Barr vs. Matteo, and they say that Mr. Raus, perhaps through his own fault, perhaps through no fault on his part, is unable to provide that information because such information as he does provide is not subject to cross-examination, and therefore the Court should reject the offers of proof which he makes, and since he cannot on his own efforts bring himself within Barr vs. Matteo his motion must fail.

Now, that is what I understand the plaintiff's position to be. Maybe I have oversimplified it or understated it; but if that is so I think we can come very quickly to the point.

I do not like to ask counsel if I have accurately stated their position.

MR. RASKAUSKAS: Well, I object to that, to him stating my argument. I would rather state my own argument.

THE COURT: Well, he has a right to state your argument as he understands it.

MR. RASKAUSKAS: I would rather do it.

THE COURT: Well, he is stating your argument, if that is the way he wants to argue his case, he can.

I had asked him what his position was, not what his understanding of your position was. Do you have any points other than the weakness of the plaintiff's points?

MR. CONNOLLY: Certainly, Your Honor. I was trying to shorten the argument if I could.

THE COURT: Well, all right, because I want to know what your points are because--

MR. CONNOLLY: Yes, my position is--

THE COURT: Because it is not clear to me.

MR. CONNOLLY: My position is, Your Honor, that at the time Mr. Raus spoke, on those occasions about which complaint was made, that he was on each occasion an employee of the United States of America; that he was acting in the scope and course of his employment; and he was following instructions--

THE COURT: Wait a minute. Let's see. He was an employee of the U.S. That is your first point?

MR. CONNOLLY: Yes, sir. That is right, Your Honor.

THE COURT: And second that he was--

MR. CONNOLLY: Acting within the scope of his duties and in the course of his employment; and that in speaking of the plaintiff, as he did--

THE COURT: Well, now, you say--all right.

Go ahead.

MR. CONNOLLY: He was executing or performing the instructions that were given him by his employer, to wit, the United States of America, and specifically Central Intelligence Agency.

Now, I say that if I establish those facts, one, general employment, and two, that he was carrying out orders and what he did was pursuant to orders, that I am entitled to rely on the principles enunciated by the Supreme Court in Barr vs. Matteo and in Howard vs. Lyons reported in 360 U.S., both opinions decided the same day, June 29, 1959.

And I rely on a number of cases that have been decided by all of the Circuit Courts since that time, and which are set forth in my previous memorandum in support of my motion.

THE COURT: I would say that if you show that, I do not suppose that there is any serious dispute that when you spoke you were acting as an employee of the United States, acting within the scope and duties of his employment, and that when he spoke he was acting under orders, I do not know whether they tell him the legal conclusion or they tell him the premise.

Which do you tell him, the legal conclusion or the premise or both?

MR. STANFORD: Your Honor, if it can be shown by the defendant that in all the instances as alleged by the plaintiff's complaint that he was actually an employee of the Central Intelligence Agency and that he was working within the scope and course of his employment, we can't argue with the fact that Barr vs. Matteo does provide a governmental immunity. But that is not the basis of our position.

THE COURT: No, now you have shifted the ground once more. You said that he was acting as an employee of the CIA, and the defendant says an employee of the United States. Now, there is the first clear issue.

MR. STANFORD: Well, if they want to make an issue over the fact whether he was an employee of the Bureau of Public Roads, that he was fulfilling his duties as a highway research engineer.

THE COURT: No, of course, it is not that. They say that he is, or they say that he was an employee of the United States and had been given these duties by the CIA. They have said also, I think, that he was an employee of the CIA. I do not know whether they have said that he was paid, that he was an employee--have you said he was an employee of the CIA or have you said that--

MR. CONNOLLY: I made that contention, Your Honor.

MR. STANFORD: I think that is the contention that is made, Your Honor, but there is no affidavit or statement as to that fact. There are statements that he was an employee.

THE COURT: It is not quite clear to me how they establish that he--he was certainly an employee of the United States. There is certainly a statement that he was acting for the CIA when he did this. The head of the CIA says that and then says you can't go beyond that in making inquiry into details.

MR. PRETTYMAN: May I say this, Your Honor?

THE COURT: Yes.

MR. PRETTYMAN: May I say in answer to that that in Mr. Helms' affidavit of April 1, 1966 he made several points in connection with that:

"Concurrently with his duties on behalf of the Bureau of Public Roads the CIA has employed Mr. Raus from time to time to carry out specific assignments on behalf of the Agency, but further that he was so employed on the occasions specified in the complaint."

He states that in that affidavit.

THE COURT: Well, he states that. He states that but what they say is that the Government will not let him be cross-examined on that.

MR. PRETTYMAN: Well, that is a different point, Your Honor.

THE COURT: And therefore that they do not have to accept that statement and that the Court can't accept it because it is unfair to allow that to be accepted without any cross-examination.

MR. PRETTYMAN: Well, that is a separate point, Your Honor. I thought you were raising the question of whether it had actually been sworn to that he was an employee.

THE COURT: Well, are you saying that it is important, is it important to you that he be an employee of the CIA because I may say that that is not beyond dispute on this record.

MR. PRETTYMAN: Well, we say that the record is undisputed on the fact that he was in fact an employee in their employ.

THE COURT: Well, I know, but they bring up 56 (f), they dispute the fact. It is disputed, and since you say you will not let them develop their facts on it it may be a case under 56 (f).

I am not sure, I am not sure either way; I have an open mind completely on whether you have shown that he was an employee of the CIA within the meaning of Rule 56 of summary judgment procedure.

MR. PRETTYMAN: One thing we did say, Your Honor--

THE COURT: I think you have certainly shown he was an employee of the United States. That is really not disputed; but they would dispute whether it was within the course of his duties.

Now, this is a brand-new point. So far as I know there is no authority anywhere near this subject in the United States of whether an espionage agent or an intelligence agent who is on the payroll of the Government in one capacity who is asked to do some work on the other can have these matters inquired into or whether at some point the statement of the head of the agency is sufficient.

So I am not quite clear what you, what the plaintiff thinks they can accomplish by cross-examination.

MR. STANFORD: Your Honor, there never has been a statement here except by counsel, and by counsel's memorandum, that this man is or was an employee of the Central Intelligence Agency.

There are affidavits of Richard Helms, which have just been quoted by Mr. Prettyman, which says that he was employed. And we feel that Barr v. Matteo does not grant its provision of immunity to anyone who is paid money at some time to work as an independent contractor, as a contact, as an informer, as someone who is not under

supervision and control as an employee of the Central Intelligence Agency.

And I think that his being an employee is a very important matter with regard to the application of Barr vs. Matteo and Howard vs. Lyons.

All of the cases that they have quoted or cited consider persons about whom there was no dispute that they were employees, and in most cases highly ranked employees.

They themselves state that he was quote"a subordinate employee," and they state "Concurrently with his duties as a highway research engineer that he was employed or used."

THE COURT: Well, you say and query whether he was an independent contractor or informer and so forth are entitled to the privilege?

MR. STANFORD: Yes, sir.

MR. CONNOLLY: Well, Your Honor, for good or ill, I do not make the point, and I want Your Honor to clearly understand this, that I do not make the point that we are entitled to rely upon Barr vs. Matteo because Mr. Raus was within the general employ of the United States and was just a casual employee of CIA.

My point is based on the fact that the record shows that he was an employee of the CIA on those occasions

about which plaintiff makes complaint. Now--

MR. STANFORD: If I--

MR. CONNOLLY: Just a minute, sir. Let me finish.

I would like to direct Your Honor's attention to the first affidavit of Richard Helms, Paragraph 3:

"On those occasions specified in Paragraphs 5, 6, and 7 of the complaint, the defendant, Juri Raus, was in possession of information furnished to him by the Central Intelligence Agency, and when he spoke concerning the plaintiff on such occasions he was acting within the scope and course of his employment by the Agency on behalf of the United States."

And may I come to the next affidavit?

THE COURT: Yes, but "in the course of his employment."

MR. CONNOLLY: By the Agency on behalf of the United States.

Now, let me finish all of them, Your Honor, so that--

MR. RASKAUSKAS: I think we have all read them, Your Honor.

MR. CONNOLLY: Do you mind my taking the time to argue, Mr. Raskauskas?

7 of the second Helms' affidavit:

"The Central Intelligence Agency has employed the defendant from time to time--concurrently with his duties on behalf of the Bureau of Public Roads--to carry out specific assignments on behalf of the Agency. Defendant was so employed on those occasions specified in Paragraphs 5, 6, and 7 of the complaint."

And then it goes on to say:

"On those occasions the defendant was furnished information concerning the plaintiff by the Central Intelligence Agency and was instructed to disseminate such information to members of the Legion so as to protect the integrity of the Agency's foreign intelligence sources."

Then the conclusion:

"Accordingly, when Juri Raus spoke concerning the plaintiff on the occasions about which complaint is made, he was acting within the scope and course of his employment by the Agency on behalf of the United States."

Then I come to Affidavit 3:

"Prior to those occasions specified in Paragraphs 5, 6, and 7 of the complaint in this action, the defendant, in a series of conferences, was furnished information by the Central Intelligence

Agency to the effect that Eerik Heine was a dispatched Soviet intelligence operative, a KGB Agent. The defendant was instructed to warn members of Estonian emigre groups that Eerik Heine was a dispatched Soviet intelligence operative, a KGB Agent. The purpose for this instruction was to protect the integrity of the Agency's foreign intelligence sources, existing within or developed through such groups, in accordance with the Agency's statutory responsibility to collect foreign intelligence and the statutory responsibility of the Director of Central Intelligence to protect foreign intelligence sources and methods. Accordingly, when Juri Raus spoke concerning the plaintiff on the occasions about which complaint is made, he was acting within the scope and course of his employment with the Agency on behalf of the United States."

THE COURT: Well, you say that you are not relying on the fact that he was an employee of the United States and was casually asked to do something for CIA?

MR. CONNOLLY: No, Your Honor.

THE COURT: That it was concurrent employment?

MR. CONNOLLY: Yes, sir.

THE COURT: And that this was part of the concurrent employment?

MR. CONNOLLY: Yes, Your Honor.

THE COURT: Now, ordinarily if this were not--

MR. CONNOLLY: On specific assignment.

THE COURT: On specific assignment.

MR. CONNOLLY: And he was acting in this case under specific direction.

THE COURT: Now, if this were not a case in which the privilege has been asserted by the Agency, the privilege of secrecy asserted by the Agency they would be entitled to question whether he was indeed an employee of the Agency or was acting as an independent contractor on special assignment, you make the point. I do not know whether that point is good or not, but assuming the point is good, an independent contractor would not be entitled to the benefit of the privilege, they would ordinarily be entitled to go ahead with cross-examination by deposition both of Raus and Helms, I guess to check on the different points that are to be considered by a Court in determining whether a man is an independent contractor or an employee. I think that is the issue.

Now, one of the elements is, of course, payment, and you want to get in that he was paid directly or indirectly by the Agency without saying how.

I am not at all clear that I can accept that evidence that he was paid by the Agency directly or

indirectly as tending to prove that he was an employee rather than an independent contractor.

MR. CONNOLLY: There are a number of things about that, Your Honor.

THE COURT: Without having, without getting more specific information. It really is the method of payment, and I have forgotten, and I started with this more than forty years ago that I argued my first case whether a man was an independent contractor or an agent or an employee, an agent or employee, and I think the restatement of the law of Torts and agency and so forth both have set up certain standards, and one of them, I believe, is the method of payment.

MR. CONNOLLY: No, it is not, Your Honor. I have to disagree. It used to be that considerable emphasis was placed on who paid the man.

The Restatement today, and the reason I am expatiating on this was that I think these gentlemen will remember just last week the United States Court of Appeals for the District of Columbia Circuit decided a rather definitive case on this question, decided under Maryland law.

I do not think Maryland law should apply since we are in this federal area; but they mention one of the criteria being who paid him, but they say that this is

no longer of any significance, that the question is, and the only question is really involved is whose work is being done, and who has the authority to control the details in connection with the performance of the work.

THE COURT: The details of the work are--

MR. CONNOLLY: Yes, and so these other indicia that at one time existed are really meaningless.

THE COURT: Well, you say then you do not care about the payment.

MR. CONNOLLY: That is right, Your Honor.

THE COURT: You are willing to throw it out the window and we do not have to worry about it.

MR. CONNOLLY: Well, I think there is evidence that he was paid directly or indirectly by the Agency, and I think that is enough. I do not mean to throw that out too with the wash; but it is there.

THE COURT: Well, you say if I throw it out it is not withdrawn because the important thing is the right to control the details of the work.

MR. CONNOLLY: And whose work is being served, whose duty--

THE COURT: Wait a minute. I think we are going to have to have this written up because this is developing entirely differently from the way the briefs are up to this time, and we are getting various points which

are refined down and the issues narrowed.

MR. CONNOLLY: That is what I tried to say, Your Honor, when I started to say what I said before and Mr. Raskauskas accused me of arguing his case, but I think I understood fairly accurately to begin with that they really do not dispute the application of Barr vs. Matteo.

They just say that we have not put in sufficient evidence of a reliable nature in the record to support the contentions we make.

THE COURT: Well, that is what I thought.

MR. RASKAUSKAS: I do not want to interrupt Mr. Connolly but I would like to offer this comment. We have never conceded that the CIA has the statutory authority--

THE COURT: Oh, I understand that, that you are making the point that this is beyond the statutory authority.

MR. RASKAUSKAS: Yes, sir.

THE COURT: --of the CIA. I understand that point.

MR. RASKAUSKAS: And if that is correct Barr vs. Matteo cannot apply.

MR. CONNOLLY: I beg to disagree.

THE COURT: All right.

MR. CONNOLLY: But if it were a minor employee, he does not have to worry about the statutory

authority. That is the point.

THE COURT: That point is made in Mr. Connolly's last memorandum. I think it is his last memorandum, which has as yet not been answered.

Now, let's take a break and a recess from the formal record. We can't run much longer on the formal record. We can come back to that. Let's discuss how we are going to set this thing up most clearly.

(Discussion off the record.)

THE COURT: After a discussion off the record in which the respective parties refined their points to some extent the Court concluded that the following schedule should be established:

One, on or before May 23rd defendant will file a memorandum brief on the scope of the permissive activities in the United States of the CIA, the permissive activities of the CIA in the United States. This is an action in the United States, isn't it?

MR. CONNOLLY: Your Honor, I am not going to undertake the burden of outlining all the areas in the United States in which the CIA--

THE COURT: So far as they apply in this case?

MR. CONNOLLY: That is right.

That is right, just to defend this action.

THE COURT: That is right, so far as they apply to this case.

MR. PRETTYMAN: Can it also be made clear that we are not restricted to that point in the event that other--

THE COURT: Oh, you can write or to further elaborate on any additional points upon which defendants rely which are not stated in the supplemental memorandum of the defendant in support of its motion for summary judgment filed April 28, 1966.

That is, I will assume that the points, that I will not have to go wandering back in your other brief. This brief which is now to be filed plus the April 28th brief will be what I will look to to see the points you are relying on, and I will go back to the others for citations of cases.

Second, on or before June 23rd plaintiff will file a memorandum brief stating its position on all of the issues raised by the defendant and any additional issue which it wishes to raise such as the 56 (f) and things like that.

MR. CONNOLLY: What was that date, Your Honor?

THE COURT: June 23rd.

And then on or before July 23rd defendant will reply to plaintiff's memorandum.

Well, if it is a Saturday, the 22nd of July then.

On or before July 22nd, defendant will reply to plaintiff's memorandum and will state whether defendant wishes an oral argument on the issues.

Within one week thereafter, that is, on or before July 29th plaintiff will state whether he wishes an oral argument, and if oral argument is requested by either side it will be set on a date in the last week in August.

MR. STANFORD: Your Honor, there is one other thing of a minor nature. It is not minor entirely, but at least a much smaller consideration, and that is with regard to Mr. LaVenia's deposition which was taken on May 3rd, we intend to make a motion with regard to that to compel the answers to the questions which were objected to and which were not answered.

We would ask that we file our motion concurrently with our memorandum, and that that be extended and no time limit established, as there would be under the rules.

MR. CONNOLLY: Your Honor, I do not want to engage in a lot of colloquy or a lot of argument; but this deposition was a waste of time, and a motion to compel answers is again a waste of time, and is nothing more than to keep this thing stirred up, and I imagine it is probably

for the purpose of press coverage.

Mr. LaVenia has absolutely nothing to offer on the question of employment, as Your Honor will see from reading even a cursory study of the deposition.

Now, they want to find out what he found in his excursions around the countryside investigating the background of Eerik Heine. I took the position in his deposition, and properly so, that that is work product. In any event it is not material until after we get this motion for summary judgment ruled on.

MR. RASKAUSKAS: You took the position he is one of the lawyers in the case on the other side. That is what you are talking about?

MR. CONNOLLY: My position was stated then, Mr. Raskauskas, and it is in the record.

THE COURT: Well, you make your motion at the time, and Mr. Connolly can answer it along with his memorandum, and the Court will decide whether it should be ruled on before or contemporaneously or after the ruling on the motion for summary judgment.

Thereupon, the hearing concluded at 5:20 o'clock p.m.

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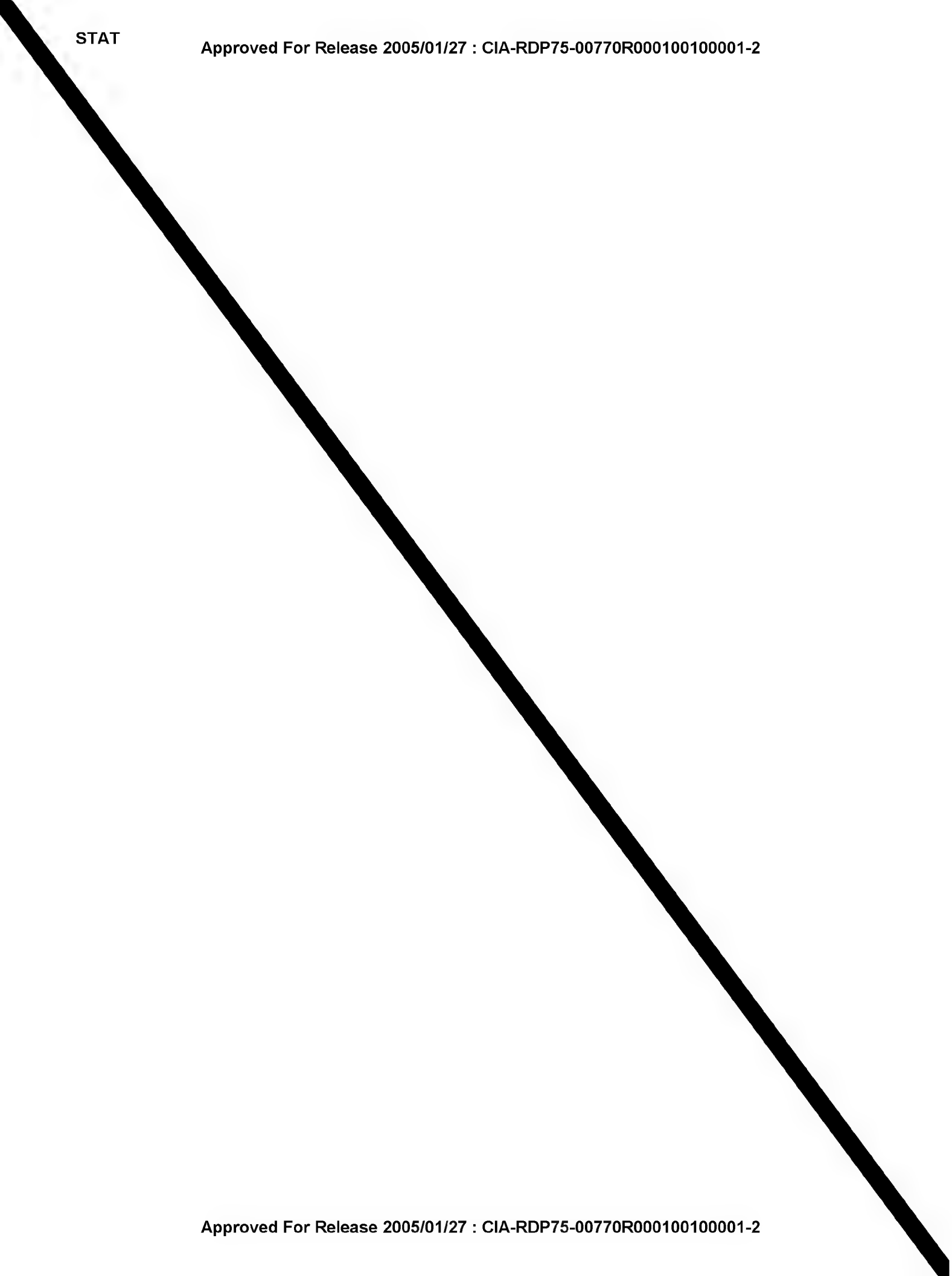
Certified to be a true and correct transcript of the proceedings in the above case.

Official Reporter



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE

vs.

JURI RAUS

Civil No. 15952

TRANSCRIPT OF PROCEEDINGS

April 28, 1966

FRANCIS T. OWENS
Official Reporter
514 Post Office Building
BALTIMORE 2, MARYLAND
SAratoga 7-7126

I N D E X

Approved For Release 2005/01/27 : CIA-RDP75-00770R000100100001-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

- - -

EERIK HEINE	:	
vs.	:	Civil No. 15952
JURI RAUS	:	

Baltimore, Maryland
Thursday, April 28, 1966

The above-entitled matter came on for hearing before His Honor, Roszel C. Thomsen, Chief Judge, at ten o'clock a.m.

APPEARANCES

For the Plaintiff:

MR. ERNEST C. RASKAUSKAS
MR. ROBERT J. STANFORD

For the Defendant:

MR. PAUL R. CONNOLLY
MR. E. BARRETT PRETTYMAN, JR.

Also present representing the United States Government, Mr. Thomas J. Kenney, United States Attorney; Mr. Kevin T. Maroney, Attorney, Department of Justice; Mr. Lawrence R. Houston, General Counsel, Central Intelligence Agency.

PROCEEDINGS

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MR. KENNEY: If Your Honor please, we have one new counsel who appears today, and I think perhaps it might be in order for me to introduce him to the Court. That is Mr. Houston, General Counsel for the CIA.

THE COURT: What is his full name or does the Reporter have his name?

MR. HOUSTON: Lawrence R. Houston.

MR. STANFORD: Your Honor, I just would like at this time to state that the plaintiff in this case, Eerik Heine, who was flown down from Canada for the purpose of this deposition--

THE COURT: I am happy to have him here. I suppose the defendant is here also.

MR. CONNOLLY: Yes, sir.

THE COURT: Because of the question of taking his deposition.

MR. STANFORD: And one other thing, Your Honor, we want to ask whether Mr. Houston was going to enter his appearance with the other gentlemen.

THE COURT: Well, no, he is here for the Government, as I understood it. As I understand it, the people who are here on the two sides are Mr. Raskauskas and

Mr. Stanford for the plaintiff, Mr. Connolly and Mr. Prettyman for the defendant, and on behalf of the Government we have the United States Attorney, Mr. Thomas J. Kenney and Mr. Lawrence Houston who has just been introduced to the Court, and also on behalf of the Government someone from the Department of Justice.

MR. KENNEY: Mr. Maroney.

THE COURT: Mr. Maroney who was here before representing, I believe, the Department of Justice.

Now, since there is such great public interest in this case, which the Court has noted by reason of reading newspapers and kind friends mailing articles, newspapers to the Court I think it is appropriate to say two things:

In the first place, I chink there have been no conferences of any sort between the Court and counsel since the last hearing with one exception, and that is that the counsel for the plaintiff called the Court on Saturday and said that they had been invited by some television station to participate in a television program, and asked the Court whether the Court felt ic was proper for them to do so.

The Court, of course, expects all counsel in every case here to comply with the canons of professional ethics of the American Bar Association, and the question of whether such an appearance would have violated that canon is perhaps not one hundred per cent clear; but the Court feels that

counsel for the plaintiff were acting with great propriety in calling the Court first, and they acquiesced in the suggestion of the Court, that since we have a jury trial that it would be better that they should not do so.

Since the last hearing here we have had filed a number of papers, perhaps the most important of which are a third affidavit by Richard Helms, the Deputy Director of Central Intelligence supplementing the two affidavits, or perhaps more accurately supplementing the second affidavit which he filed.

The reason for distinguishing between the two affidavics is that the first affidavit was filed by the counsel for the defendant without any official appearance on behalf of the United States or any representation to the Court by the United States that the affidavit was offered on behalf of the United States as distinguished from being offered on behalf of the defendant.

In addition to that affidavit filed on April 25th there was filed on the same day an amended answer, which apparently was also served on counsel for the plaintiff on that date. That was on the 25th of April, and the Court has received and read the supplemental memorandum of counsel for the plaintiff of Points and Authorities in opposicion to the defendant's motion for summary judgment,

which was filed on April 27, 1966. That is yesterday.

Now, so that the present proceedings may be made more clear not only to the press but so that the Court understands the various matters which have been heretofore brought to the attention of the Court, I think it is helpful for us to review what the Court understands to be the controlling law in this case.

The complaint is an ordinary complaint for slander, and an answer was filed to it which set up various defenses but did not claim absolute privilege. The original complaint was filed in November 1964; the original answer was filed in January of 1965.

Thereafter the deposition of the plaintiff was taken by counsel for the defendant after some negotiations, I believe, entirely between counsel, but which included the filing in court of certain affidavits which have been mentioned by counsel for the plaintiff and will probably be mentioned again.

On November 25, 1965 a very elaborate set of interrogatories, some for 424 in number with some of them having subdivisions of a considerable number so that they amounted to a great many questions were propounded by counsel for the plaintiff.

The defendant moved to strike the interrogatories for reasons which have never been argued to the

Court, so that those questions are just hanging at the moment, but along with the objections to the interrogatories the defendant filed a motion for summary judgment and attached to it this first affidavit of the Deputy Director of Central Intelligence, and that was when the case first came to the attention of the Court.

Now, the Court felt that the Government should participate for the reasons which are set forth in two opinions of the Supreme Court. The first is United States vs. Reynolds, 345 U.S. 1, which was a suit rising out of an airplane crash in which the Government was sued by either--I know by the beneficiaries of some of the people who were killed in the crash and perhaps by some people who were hurt.

At any rate, the Government having been sued on the Tort Claims Act made a claim of privilege against the efforts of the plaintiff to discover a report which showed why the aircraft might have fallen. It appears that the aircraft was being tested. It was a new type of plane, and the widows of the civilian observers had brought suit against the United States, and they had sought to obtain the production of the Air Force's official accident investigation report and the statements of the surviving crew members taken in connection with the official investigation.

They were eventually allowed to have the testimony of the crew members taken in connection with the official investigation. They were eventually allowed to have the testimony of the crew members but they were denied the official reports.

"The Government moved to quash the motion, claiming that these matters were privileged against disclosure pursuant to Air Force regulations. The District Judge sustained plaintiff's motion, holding that good cause for production had been shown. The claim of privilege was rejected," because of the Judge's construction of the Tort Claims Act.

"Shortly after that decision the District Court received a letter from the Secretary of the Air Force, stating that 'It has been determined that it would not be in the public interest to furnish this report.' The Court allowed a rehearing on its earlier order, and at the rehearing the Secretary of the Air Force filed a formal claim of privilege. This document repeated the prior claim based generally on RS Section 161, and then stated that the Government further objected to production of the documents 'for the reason that the aircraft in question, together with the personnel on board, were

engaged in a highly secret mission of the Air Force.' An affidavit of the Judge Advocate General, United States Air Force, was also filed with the Court, which asserted that the demanded material would not be furnished 'without seriously hampering national security, flying safety and the development of highly technical and secret military equipment.' The same affidavit offered to produce the three surviving crew members, without cost, for examination by the plaintiffs."

Now, it seems that when the case got to the Supreme Court they said:

"We think it should be clear that the term 'not privileged' as used in Rule 34, of the Federal Rules of Civil Procedure, refers to 'privileges' as that term is understood in the law of evidence. When the Secretary of the Air Force lodged his formal claim of privilege he attempted therein to invoke the privilege against revealing military secrets, a privilege which is well-established in the law of evidence. The existence of the privilege is conceded by the Court below, and indeed, by the most outspoken critics of governmental claims to privilege.

"Judicial experience with the privilege which protects military and state secrets has been limited in this country. English experience has been more extensive, but still relatively slight compared with other evidentiary privileges. Nevertheless the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege lodged by the head of the department which has control over the matter after actual personal consideration by that officer. The Court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. The latter requirement is the only one which presents real difficulty. As to it, we find it helpful to draw upon judicial experience in dealing with an analogous privilege, the privilege against self-incrimination.

"The privilege against self-incrimination presented the Courts with a similar sort of problem.

Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses. Indeed, in the earlier stages of judicial experience with the problem, both extremes were advocated, some saying that the bare assertion by the witness muct be taken as conclusive, and others saying that the witness should be required to reveal the matter behind his claim of privilege to the Judge for verification. Neicher extreme prevailed, and a sound formula of compromise was developed. This formula received authoritative expression in this country as early as the Burr trial. There are differences in phraseology, but in substance it is agreed that the Court must be satisfied from all the evidence and circumstances, 'and from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result.' If the Court is so satisfied, the claim of the privilege will be accepted wichout requiring further disclosure."

So much for the discussion of the claim of

privilege against self-incrimination.

Then the Court continued:

"Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the Court may automatically require a complete disclosure to the Judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the Court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the Court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the Judge alone in chambers."

Now, they continued:

"In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense," and then they discuss the facts in that case, and then went on:

"Even with this information before him the

trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege. Thus it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force, on circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had then been made.

"In each case, the showing of necessity which is made will determine how far the Court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the Court is ultimately satisfied that military secrets are at stake. A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail."

Now, I take it that those are the principles

which the Court must apply in this case. They have been elaborated to some extent in later cases in the Court of Appeals and in the Supreme Court. I believe there is no case directly in point in the Fourth Circuit which is binding upon me; so the only binding authority on me are these decisions of the Supreme Court, the Reynolds case, which I just read, and any principles which may be in the very difficult Barr vs. Matteo case, decided in 1959, a few years after the Reynolds case, and in the Howard vs. Lyons case, both of which were decided the same day, but of them reported in 360 U.S., which discuss various phases of governmental privilege, but do not discuss the military privilege point which we have here.

Now, the only Fourth Circuit cases which the Court believes are directly in point are decisions which would guide the Court in when it is appropriate to grant summary judgment and when it is not appropriate to grant summary judgment. There are cases which come out one way and cases which come out the other way, and I think those principles are now relatively clear in this Circuit.

With this in mind, particularly the principles of the Reynolds case, when the first affidavit was presented in court in support of the motion for summary judgment the Court ruled that there was not at the time certainly before

the Court a sufficient basis for granting a summary judgment in favor of the defendant, particularly because the matter was not being presented by the Government.

I believe Mr. Kenney came up briefly that morning; if not he certainly appeared at the second hearing along with Mr. Maroney representing the Government, and this second affidavit of Mr. Helms was presented formally by the attorneys for the Government, the Department of Justice, who ordinarily handle those matters in chis court, and indicated that the Government was making the claim.

Now, after reading that affidavit, and with the principles in mind stated in the Reynolds case, the Court was not satisfied that a summary judgment might properly be granted but that there should be some further exploration of the facts as indicated by the Reynolds case as far as the interest of national securicy would permit.

Therefore, the Court adjourned the hearing with the suggestion that two things might be done: That the Government might clarify its affidavit by clearing up certain things which were perhaps implied in the second affidavit but were not explicitly stated; and secondly, that the deposition of the defendant might be taken; and third, that the plaintiffs might present any additional material in the way of evidence or attempt to secure evidence which they might wish to have presented to the

Court in opposition to the motion for summary judgment, and that the Government also might present any additional matters which it felt should be presented to the Court.

The Court also said that if the deposition of Mr. Raus was to be taken that I thought it useless to take it before a notary public or other customary officials because there would be bound to be some objections, perhaps a good many objections to the questions which were asked and that any rulings which such notary would not be able to answer and would have to be before the Court, and they might as well be brought before the Court in the first instance.

Therefore, the Court suggested that the deposition be taken before the Court, and that idea was accepted by counsel for both parties, and the question then where it should best be taken has been in the air, and I think the parties have finally agreed that this was the proper place in which the deposition should be taken.

So we are here now to permit the plaintiff to take the deposition of the defendant as far as they may be allowed to take it against any objections which the Court may feel the Court should sustain under the principles which have been enunciated, and also to permit the Court to consider any other matters which may be before the Court.

These additional papers have now been filed, and the issue is certainly crisper and more specific than

it has heretofore been, and I will be happy to hear now from counsel for each side as to the matters which they believe are before the Court for decision either today or after reflection or after further argument, which might be held today or at some other time, and some suggestion by counsel as to the order in which these various matters should be taken up.

I suppose we should hear from the plaintiff first.

MR. KENNEY: If Your Honor please, before you go to that, there is just one more preliminary matter.

THE COURT: Yes.

MR. KENNEY: The Government has prepared, and I think this might be the appropriate time the claim of privilege under the statute on behalf of the CIA.

THE COURT: You mean the more formal claim?

MR. KENNEY: Yes, sir.

THE COURT: All right.

Have you already given that to counsel for the plaintiff?

MR. MARONEY: No, Your Honor.

MR. CONNOLLY: Your Honor, in view of some of the recent memorandums that have been filed by the plaintiff we thought it would be appropriate also to prepare a supplemental memorandum which in its terms says

that the defendant desires to restate its legal position on the pending motion in the simplest and most concise terms, and I hope I have reduced it simply enough, and I would like to file that, Your Honor.

THE COURT: Well, I gather plaintiff before we go any further, plaintiff would want to look at these papers, the Court will want to look at them, everybody else would like to smoke a cigarette, and the Court will therefore take a ten minute recess.

MR. CONNOLLY: Thank you.

(Thereupon, there was a short recess taken, after which the following occurred:)

THE COURT: I gather the claim of privilege has now been marked "filed," and the supplemental memorandum has been filed, and I believe all the memoranda have been filed in the case, and not have been sent to me.

The practice varies. Usually the Washington area lawyers send them to the Clerk, and the Baltimore area lawyers send them to the Judge. It makes no difference. I think the best thing to do is to have it continue uniform so we will not have some in and some out.

All right. Do you have some suggestion as to how we should proceed?

MR. RASKAUSKAS: Yes, Your Honor. In view

of the claim of privilege filed by the Central Intelligence Agency the plaintiff suggests that we commence taking the deposition of the defendant and see how far we can get on the matters we feel are relevant to this issue of official immunity, and I think until we make this attempt that it would not be appropriate to suggest any further procedure.

THE COURT: All right. What do you have in mind after that?

MR. RASKAUSKAS: Well, after that I have in mind, Your Honor, that the questions we propose to ask now are relevant to the status of Mr. Raus.

THE COURT: To his claim of privilege?

MR. RASKAUSKAS: Yes, sir.

THE COURT: To his status, which is part of it.

MR. RASKAUSKAS: Yes.

THE COURT: The defense of privilege.

MR. RASKAUSKAS: Yes, whether he was an informer, paid or unpaid, casual contact, and so forth.

THE COURT: Yes.

MR. RASKAUSKAS: Now, if he declines to answer any of these questions I think then it would be appropriate for the Court to consider our pending motion to strike the order entered permitting an amended answer in view of these new developments because we would then

claim that the defendant has been permitted to amend his answer to make allegations which unfortunately because of executive privilege he could not prove.

So it would be useless to permit an amendment of the answer if he cannot prove the defense.

THE COURT: I will be glad to hear from you.

MR. CONNOLLY: Well, Your Honor, speaking for Mr. Raus, we have no objection to commencing taking his deposition. The reason that we asked for a protective order earlier was because Mr. Raus was under the stricture of a secrecy agreement and the prohibition of the espionage laws against answering questions involving the nature of his work.

The second affidavit instructed him not to answer any questions, and we asked for a protective order. Now, the United States has intervened, and we are prepared to go ahead with Mr. Raus' deposition under the aegis of the Court and in view of the privilege which has been asserted.

I think the thing to do is to delay all legal arguments pending the conclusion of this because there is no use crossing bridges until we come to that.

THE COURT: Does the Government wish to say anything?

MR. MARONEY: The Government is satisfied with that procedure, Your Honor. We would only suggest that

when the witness takes the stand that he be given an instruction following each question that he hesitate to permit us an opportunity to make an objection.

THE COURT: I think that is all right.

MR. CONNOLLY: Mr. Raus, will you come foreward, please.

Thereupon

JURI RAUS

was called as a witness on deposition and, having been first duly sworn, was examined and testified as follows:

MR. CONNOLLY: Your Honor, before we commence--

THE CLERK: Mr. Raus, would you take the stand here.

THE COURT: Yes.

MR. CONNOLLY: Presumably the issues raised by the pleadings would go much farther than just the issue of his employment. Perhaps it would be wise since I may have some objection on rather pedestrian legal grounds to some questions to find out what is the scope of inquiry here.

As I take it, Mr. Raskauskas' statement, he is going to inquire about his statement, his employment status; is that correct? Or are you going beyond that?

THE COURT: Well, I gather the line that they

want to inquire about seems more or less indicated by the brief which they filed yesterday. Is that correct?

MR. RASKAUSKAS: Well, we are interested in having the widest possible discovery, but today we propose to ask questions concerning the scope of his employment and relationship with the Central Intelligence Agency.

THE COURT: That is the first bridge. If you can't get over that bridge you never get to the other one.

MR. CONNOLLY: Yes.

THE COURT: If you get over that bridge then we face the second one.

MR. RASKAUSKAS: I do not feel it necessary for us to impose upon the Court as far as general questions respecting the other defenses are concerned.

THE COURT: All right.

MR. CONNOLLY: The reason I bring that up is you know perhaps, under a claim for punitive damages, a man's financial resources would be in point.

THE COURT: We are not going into that.

MR. RASKAUSKAS: No.

THE COURT: I do not think we have gotten to that yet.

MR. CONNOLLY: All right.

THE COURT: I do not know his financial--I think that his employment, whom he was working for and what, if any, his connection with the CIA was are matters which I gather they want to go into.

Let's take the questions as they come because the questions might bear on both subjects. I do not want to make any general rulings at this time.

MR. CONNOLLY: No.

THE COURT: Maybe after I have made such specific rulings we may be able to be more general after we see what the points are.

MR. RASKAUSKAS: May I proceed, Your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. RASKAUSKAS:

Q Will you state your name?

A Juri Raus.

Q Your address?

A 6508 Osborne Road, Hyattsville, Maryland.

Q Your age?

A Thirty-nine.

Q Your birthplace?

A Dactu, Estonia.

Q When did you emigrate to the United States?

A In August 1949.

Q Are you a citizen of the United States?

A Yes.

Q When did you become a citizen of the United States?

A In March 1953.

Q Was your citizenship speeded up by virtue of service in the armed service of this country?

A Yes.

Q What branch of the service were you in?

A Army.

Q What branch of the Army?

A Transportation Corps.

Q And what is the date of your Army service?

A September 1950 until September 1952.

Q What rank did you attain in the service?

A Corporal.

Q And after your discharge from active duty did you become a member of a reserve component in the Armed Forces?

A After graduating from a college.

Q When did you graduate from college?

A In 1956.

Q And when did you become a member of a reserve unit?

A In December 1956.

Q And what reserve unit was that?

A Three hundred-and-first Engineering Combat Battalion.

Q And what rank did you hold after you became a member of that unit?

A Second Lieutenant.

Q Are you still a member of a reserve unit?

MR. CONNOLLY: Just a minute.

THE COURT: What?

MR. CONNOLLY: Is there a problem, Mr. Raus?

THE WITNESS: I was a member of the service unit until November last year, until the unit was disbanded. So now I belong to the control group.

BY MR. RASKAUSKAS:

Q At the time you left this active group what was your rank?

A Captain.

Q At the time you went to this inactive group what was your rank?

A Captain.

Q Have you been since promoted?

A No.

Q When were you promoted to Captain?

A December 1963.

Q And when were you promoted to First Lieutenant?

A I believe it was in 1960--it was in 1957.

Q What month?

A I cannot recall.

Q And what inactive unit are you a member of at this time?

A I am carried on the list of the Army Reserve Control group, active reserve.

Q Did you go to meetings regularly?

A No.

Q How much income did you receive from your reserve duty in 1965?

MR. CONNOLLY: Objection. It is immaterial.

THE COURT: What is the materiality?

MR. RASKAUSKAS: The materiality is to show his income from any sources. The defendant has already made an affidavit, a gratuitous affidavit respecting his income, and we wanted--

THE COURT: The Government is not objecting?

MR. MARONEY: We do not object to this specific question, Your Honor, but we would object to further, a further line of inquiry into his income.

THE COURT: I understand that the fact that the Court may overrule the objection does not mean that you

should not object to another one, and in order to save time, can it be understood that a failure to object to a particular question shall not be considered as a waiver of later questions along the same lines so that we won't have to apply the strict rules that are applied in incrimination matters of when you have answered one you have opened it up to answer others?

MR. STANFORD: Unless that is a leading question, it is a type of question which could be corrected at the time.

THE COURT: Oh, yes, I do not want to have an objection to each question in order to preserve their right to object later on down the line. I think we would just be wasting a lot of time.

MR. RASKAUSKAS: Very good, Your Honor.

MR. CONNOLLY: Your Honor, may I state this one proposition, which I need not repeat. There is no sworn statement of Mr. Raus on file in support of a motion for summary judgment. Therefore, questions going to his credibility I contend are immaterial.

The affidavit which was filed, which Mr. Raskauskas makes reference to, was an affidavit of January 1955 in which he sought a protective order--January 1965.

THE COURT: In which he sought--

MR. CONNOLLY: Sought a protective order, in

which he said what his income was at that time.

Now, I think that is relevant only as to that issue. It is not relevant on the issues that we have here.

THE COURT: Well, of course, a deposition for discovery, counsel for the party taking the deposition is not limited to evidence which is necessarily relevant. They may ask questions which go to evidence, which may lead to relevant evidence, and since the issue is a possible issue in the case, and since it is desirable as far as possible to have one deposition and not to have to come back again, it is quite probable that if they do not get over the first bridge this is going to be immaterial.

If it affects credibility in getting over the first bridge I would be disposed to allow it in. I will therefore overrule the objection. You may continue objections to a similar question and I will rule on each one as it arises.

Objection overruled. You may answer it.

The question is how much you made, how much income he received from his services in the military reserve of the United States in 1965, as far as he recalls.

Is that it?

MR. CONNOLLY: Your Honor, that is not the question.

THE COURT: Wasn't that it? Wasn't that the question? Then I misunderstood him. What was the question? Do you want to repeat the question? Why don't you repeat it?

(The last question was read by the Reporter.)

MR. CONNOLLY: Can you wait just a second?

THE COURT: All right.

THE WITNESS: Approximately one thousand dollars.

BY MR. RASKAUSKAS:

Q Now, all of this money in the approximate amount of one thousand dollars you were paid for your duty as a member of this reserve component; is that correct?

A Yes, partly through the unit I belonged to, and also partly by an intelligence school I attended in the summer of '65.

Q Where did you attend this intelligence school?

MR. MARONEY: Objection to where, where he attended this intelligence school.

THE COURT: I do not see where makes any difference. The Government is objecting.

MR. RASKAUSKAS: Well, I would like to say this, Your Honor, that the defendant added this to his answer. I did not elicit this information, and if Your Honor will hear me out, he opened the door on this subject,

and I am interested now in inquiring into it.

THE COURT: If the Government is objecting, the Government does not have to tell where it conducts--if the Government feels it should not tell where intelligence schools are conducted, you are inquiring about whether he got all of his thousand dollars through his unit.

He has answered it frankly and fully, that it was partly through the unit and partly through attendance at an intelligence school.

MR. RASKAUSKAS: And that leaves a question, Your Honor, whether this intelligence school was related to the reserve unit or whether it was related to the CIA.

THE COURT: If the Government objects, you asked where it was located. I will sustain the objection. It does not seem to me to be material, or it seems to me to come within the privilege. I have to weigh each one.

The weight of this side comes down on the Government's side.

BY MR. RASKAUSKAS:

Q Now, were you paid for your attendance at this intelligence school?

MR. MARONEY: He has already answered that, Your Honor.

THE COURT: He said part of it.

MR. STANFORD: Your Honor, I think that at

this point I think this procedure has something which is inherently defective. Mr. Raus, after hearing the question, looks to his counsel in order to get an assent as to whether he is to answer.

At times that assent may be construed as an answer itself, and I would ask that the counsel therefore give no, make no motion, or make no motion but to state merely that they object to a question, and I make no accusation here that they have. But I merely say that it is confusing to the witness himself.

THE COURT: Counsel know that this Court does not believe in signaling to a witness.

MR. STANFORD: I do not make any accusation.

THE COURT: Beyond the question of whether he may answer or not, and the witness is to understand that no signaling is to be anything more than he may answer or whether he should hold up answering.

MR. CONNOLLY: Your Honor, in this case I may say for the defendant that this is an unusual situation because he is prohibited from answering at all.

THE COURT: I understand.

MR. CONNOLLY: And the signaling which he is getting is in effect one, as to whether he is permitted to say anything--

THE COURT: Well, I think that is exactly

right.

MR. CONNOLLY: And there is a difference.

THE COURT: He signed an agreement that he would not disclose anything beyond what he is permitted to disclose, and he might violate the law and be subject to penalties if he did.

MR. MARONEY: I would only like to state, Your Honor, that I think Mr. Houston has been occasionally nodding his head in order to expedite matters, and if the Government has no objection to the question that he could proceed with the answer.

THE COURT: The Court understands that that is going to expedite the matters, and that is the limit of what will be done. We are dealing with honorable men on both sides.

BY MR. RASKAUSKAS:

Q Was your attendance at this intelligence school within the framework of your reserve component?

MR. MARONEY: Objection, Your Honor.

THE COURT: Well, I want to have some idea. You need not be too specific, and I am aware that in asking for information on which to make a ruling I did not require you to disclose the secret which you may be entitled to keep.

There is a statement in the affidavit which

has been filed by Mr. Helms in both of his affidavits that Mr. Raus--I do not want to misstate it--that the Central Intelligence Agency has employed him from time to time--this is in the second one--concurrently with his duties on behalf of the Bureau of Public Roads to carry out specific assignments on behalf of the Agency.

The later one, which is the third affidavit, I think does not add anything except the purpose for which--oh, it says accordingly when he spoke, the third one says when he spoke concerning the plaintiff on occasions about which complaint is made he was acting within the scope and course of his employment in the Agency on behalf of the United States.

So the fact that he has been employed by the Agency at times in the past, or whether he is now so employed or not, has been made public so that anyone who is interested in whether he has been an agent of the United States now knows that he has done the matters which have been set out in these affidavits.

Your position is this, as I understand your position to be that it is inconsistent with governmental intelligence to know whether he is still acting in intelligence work for the CIA or other agency other than normal Army work?

Is that the basis of it or is there some other basis for it?

MR. MARONEY: That is right, Your Honor, any further explanations by him of his connection with intelligence would impinge on security.

THE COURT: I do not see that his present connection with security or Intelligence, Central Intelligence or with any other security, any such continuous activity beyond the time of the alleged slanderous remarks have any great materiality in the case.

Again it seems to me the weight comes down on the Government's side. I will be glad to hear from you if you have any argument to the contrary.

MR. RASKAUSKAS: Your Honor, we contend that these questions are very relevant. There have been allegations made which are conclusory and which we claim usurp the province of this Court and a jury as to whether or not this man was in fact an employee of the CIA, and in order to ascertain that fact we want to know what the sources of income were for the last several years, and it is reasonable to find out when his relationship, whatever it was, with the CIA commenced, when it terminated, whether he was paid or unpaid by them to find out what his status was before he can squeeze himself in under Barr vs. Matteo as a government official or employee, and we feel that that

fact has not been resolved.

THE COURT: I rule that what he did in 1965 in the way of going to school is not discoverable. I sustain the objection. Particularly, I am noting that 1965 is later than the last alleged slanderous remark.

MR. RASKAUSKAS: Very well, Your Honor.

BY MR. RASKAUSKAS:

Q Will you state each and every source of income for the calendar year 1963, specifying the amount of payment and from whom the disbursement was made.

MR. MARONEY: Objection, Your Honor.

THE COURT: On what grounds?

MR. MARONEY: On the ground that to require him to specify each and every source of income would get into--

THE COURT: Well, we are going to get, the real issue in this case, as I gather, that you are working on now, is whether he was an employee of the Agency. Now, you have said that he was an employee of the Agency in the affidavits.

MR. MARONEY: Yes, sir.

THE COURT: The Government has stated the scope of his employment with the Agency. I do not know whether he is an officer or exactly what his employment was.

They are set out in some general way in the second affidavit, and only in this conclusory fashion in the third. There is some specificity in the second.

Now, the question which the Court is going to have to pass upon under this claim of privilege which he asserts, which is being asserted by the Government also, requires my consideration of these factors which I read out.

Ordinarily whether a man is an employee of, let's say, an employee of a corporation, one of the factors in determining it is whether he is paid for his work. The employer in this case is the United States of America.

Now, I gather there is no dispute that he was employed by the United States of America in some capacity and that he was paid a salary, wages, presumably a salary as either an officer or employee of the United States.

Now, if he was not paid anything by the CIA but was on the payroll of some other organization it is-- well, the possibilities are these: He was either entirely on the payroll of the CIA, in which event the first affidavit was incorrect; in the second place, he was entirely on the payroll of the Bureau of Public Roads, in which event the first affidavit was entirely correct.

It is possible that he received some

compensation from the Bureau of Public Roads and some compensation from some other governmental agency, in which event his statement in his first affidavit was correct as far as it went, and he was prohibited by secrecy from going any further, I gather is the position taken.

Now, I do not see that there is any harm, and I will be glad to hear general argument of why there is any harm in disclosing whether he was paid anything by anybody except the Bureau of Public Roads.

I am not saying that it is going to affect my decision; I am not sure that it can. If he is employed by the United States I certainly do not have any preconceived idea that it is not in the best interest of the United States sometime that a man who is employed by the one branch of the government may do work for an intelligence agency without receiving additional pay.

I will hear argument on that if it becomes necessary; but if it is a question--well, let's see what is the basis for the objection.

MR. MARONEY: Well, first of all, Your Honor, we have no objection to his testifying as to employment he received from the Bureau of Public Roads.

THE COURT: All right.

MR. MARONEY: We do object to the question which asks for an itemization of all incomes and sources

thereof, and we note that the Central Intelligence Act authorizes the Director to withhold from public inspection or notice the wages paid to employees, and of course, the identification of employees.

THE COURT: But you have identified him. Now, I do not care how much he was paid for it, for whatever he was doing.

But you agree that he may answer--let's take it step by step. There is no objection to his answering what, if anything, he received from the Bureau of Public Roads. Is that right? All right. Answer to that extent.

MR. CONNOLLY: Just a minute, sir.

MR. MARONEY: May we have a moment, Your Honor?

THE COURT: Yes.

(Short pause in proceedings.)

THE COURT: Well, the Court understands he might be paid directly something by the CIA. He might be paid overtime by Public Roads which didn't really turn up on its budget but came from the CIA, and the checks cleared someway. He may have been paid through some cover organization. If he is paid through a cover organization I certainly do not want to know the name--I do not think the cover organization should be disclosed.

I think if he was paid anything directly or indirectly by CIA it tends to clarify one element of the question of whether he was an employee of CIA, whether paid directly or not or as distinguished from an employee of the United States generally.

I am not sure that is an important issue, but I think the more information we can have the easier it is for the Judge to decide the question.

MR. MARONEY: Unfortunately, Your Honor, I think that if we get into the question of pay you get into the problem of intelligence methods and techniques.

To repeat my previous statement, we do not object to the question as to his income from the Bureau of Public Roads. We would object to the broad question as to the source of all income.

THE COURT: All right. Well, he may answer then what he made from the Bureau of Public Roads.

MR. CONNOLLY: That is a three year period, '63, '64, and '65, as I understand it.

MR. RASKAUSKAS: I have not gotten to that yet.

MR. CONNOLLY: I thought the first question was three years.

THE COURT: I thought it started with '63.

MR. RASKAUSKAS: Your Honor rules then that--

THE COURT: He may answer with respect to the Bureau of Public Roads. Then I will rule on the next question.

I am allowing him to answer what is not disputed, to begin with. Then we will come to ruling on the dispuced items.

MR. RASKAUSKAS: Very well, Your Honor.

BY MR. RASKAUSKAS:

Q Were you an employee of the Bureau of Public Roads in 1963 for the entire calendar year?

A Yes.

Q What was your salary with the Bureau in that year?

A It was approximately $8/00 a year.

Q What was your grade at that time with the Bureau of Public Roads?

A GS-11.

Q What was your--

THE COURT: You said his salary. Did you get paid overtime also?

THE WITNESS: No, Your Honor.

THE COURT: You mean this is not something that carries overtime?

THE WITNESS: No, Your Honor.

BY MR. RASKAUSKAS:

Q And what was your occupation with the Bureau of Public Roads?

A Highway research engineer.

Q Now, the $8700 that you received as a GS-11 from the Bureau of Public Roads of the Department of Commerce, was all of the income for services rendered by you in your position and occupation?

MR. MARONEY: May we have a moment, Your Honor?

THE COURT: Yes.

He said he was not paid overtime. I gather he was not docked if he was out.

MR. RASKAUSKAS: The question I am propounding, I will withdraw that question and perhaps restate it more simply.

BY MR. RASKAUSKAS:

Q In 1963 when you were employed by the Bureau of Public Roads of the Department of Commerce at an annual income of approximately $8700 as a GS-11, I ask you if all of the income you were paid by the Bureau was for the duties which you rendered in the job which you stated you held with that Bureau?

THE COURT: Do not answer that until--

BY MR. RASKAUSKAS:

Q As a highway research engineer--

THE COURT: Until I have had an opportunity to rule.

MR. MARONEY: The Government objects to that question, and instruct him not to answer.

THE COURT: You mean you instruct him not to answer that?

MR. MARONEY: Yes, sir.

THE COURT: Well, if you instruct him not to answer, that brings us to the basic question, I suppose, of whether the Government, and particularly the CIA should be entitled to protect the sources of compensation.

Is the CIA, is the Government taking the position that this man was an employee--you said he was an employee in '63 and '64 of the CIA, I take it, because you say on those occasions, and those occasions included November of '63 and sometime in '64.

Are you saying, you are saying that he was your employee, but you are refusing to say whether, or are you refusing to say whether he was paid directly or indirectly by the CIA for those services?

Now, if he was paid--I do not much care whether he was paid directly or indirectly--but why does it hurt the CIA to say--only this first question. Now, I

am not going beyond the first question, to have the Government state, if you will not let him state, let the Government state, whether he was paid directly or indirectly for some services, for services rendered to the CIA or whether they were rendered on a purely voluntary basis or whether they were rendered by arrangement between the CIA and one or more of the departments.

Did he get anything for his work? That is all that is being asked, and if you would explain to me why that will hurt as far as that can consistently be done without disclosing national secrets I would like to understand it because it is not clear to me why having said he was an employee you will not say whether he was serving in a voluntary capacity or was being paid in some way?

MR. MARONEY: Well, Your Honor, our problem is that in order to make an explanation to Your Honor's inquiry would require a disclosure of the methods or some methods.

THE COURT: Well, is it any secret whether the CIA, whether all people who are employed by the CIA appear on its payroll as such? Is that a secret?

MR. MARONEY: Yes, sir.

THE COURT: That is a secret?

MR. MARONEY: Yes, sir.

THE COURT: And the CIA does not take a position, does not want to take a position on whether all people who render services for it and whom it feels entitled to control are paid people or some volunteer?

MR. MARONEY: That is correct, Your Honor.

THE COURT: All right.

MR. MARONEY: And the Director has statutory authority to withhold.

THE COURT: Well, let me have this code, the one I read, the section I read. It is Section 403 something.

MR. CONNOLLY: (g). I think there is a specific one dealing with salaries too, Your Honor.

MR. MARONEY: 5 U.S.C. 947.

THE COURT: 5, 947. Have you 5 over there? That is the General Executive Departments, isn't it?

MR. MARONEY: No, Your Honor, that is not the citation.

THE COURT: Well, it is 50 U.S.C.A. 403 (g).

MR. MARONEY: 503 (g).

THE COURT: (g) or (j)?

MR. CONNOLLY: 403 (g).

THE COURT: (g).

MR. CONNOLLY: "In the interests of the

security of the foreign intelligence activities of the United States and in order further to implement the proviso of Section 403 (d) (3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of Section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency."

THE COURT: Well, that is right, but we are not asking at this point--the plaintiff at this point is not asking for his salary, and my suggestion does not carry that you tell his salary.

My suggestion, and I do not say this specifically says it, why you can't say either yes or no that he received some compensation directly or indirectly whether through release from certain duties with the Bureau of Public Roads or otherwise without specifying for what he did.

I do not see why the answer to that question even literally comes within (g). He must not say--I would agree he does not have to say what his salary is

against that objection, but I do not see that this prohibits your disclosing whether you were using volunteers or whether you are paying, whether you are using some volunteers or whether you are paying people, and if he was paid in some way, it seems to me it is material.

I do not see that they can, that this Section 403 "g" prevents them going further, but I do not see why it would prevent them knowing whether he was acting as a volunteer or as a paid employee directly or indirectly, and I am inclined to think they can't go beyond directly or indirectly.

Are you willing to indicate how far you will go assuming that no further questions along those lines will be permitted?

MR. CONNOLLY: Your Honor, can you indulge us a moment?

THE COURT: Yes, I would like to know how far you can go with the understanding nothing more will be permitted, and then I will have to rule after hearing from the plaintiff whether that is the line the Court feels should be drawn.

MR. CONNOLLY: Answers sometimes are a burdensome thing, Your Honor.

THE COURT: Would you like a little more time? We can take a break again if you want? Do you want a break?

I mean is there something you want to discuss after a little longer?

MR. CONNOLLY: If we can just step out in the hall for just about thirty seconds?

THE COURT: All right. Go ahead, and I will also step out.

(Thereupon, there was a short recess taken, after which the following occurred:)

MR. MARONEY: If Your Honor please, Mr. Houston will make a statement in connection with Your Honor's inquiry.

THE COURT: All right.

MR. HOUSTON: Your Honor, the Government asserts that the defendant was paid directly or indirectly for services on behalf of CIA during the times in question.

THE COURT: And you object to his stating how much or through whom?

MR. HOUSTON: Any other questions relating to that.

MR. RASKAUSKAS: Your Honor, at this time I make a motion that that statement be stricken from the record. Every statement, each and every allegation made by the defendant must be tested in the crucible of cross-examination, and our contention is this that it is indeed presumptous for the plaintiff or his counsel to state what

is a secret and what is not a secret, and that is within the purview of the executive body.

THE COURT: Who?

MR. RASKAUSKAS: The statements made by the executive directly or through its representative must be susceptible of cross-examination, and they may either say everything or nothing, and we object to such self-serving declarations.

THE COURT: I understand that. Now, assuming that were included in the affidavic, that we were not having it stated by Mr. Houston, but assuming it were included in the affidavit of Mr.--the latest affidavit I believe, the affidavit of Mr. Helms, and the claim of privilege by Mr. Raborn, assuming that were included in an affidavit by Mr. Helms or Mr. Raborn, you would object to the Court's considering the fact without its being admitted subject to cross-examination.

But are you willing to take Mr. Houston's statement to the same extent as if it were included in an affidavic?

MR. RASKAUSKAS: No, Your Honor, I cannot, and I would state further that the affidavit said, and the claim that was filed today said if there was another word stated about Juri Raus and Eerik Heine and the CIA it would be against the national security.

THE COURT: You have asked for this information, and this comes up by reason of your questions.

MR. RASKAUSKAS: Yes, sir.

THE COURT: All right. I do not want to proliferate affidavits. That is the point, it seems to me foolish just to have a great quantity of affidavits, and I do not want you to waive any points.

It just seems to me chat if Mr. Houston states the facts it might be assumed to be the fact to the same extent as if included in the affidavit subject to your objection to che Court's considering that fact or alleged fact or stated fact or sworn fact on the motion for summary judgment.

I want to preserve your relevancy and materiality attack on privilege claims. I am trying to get over the competency point.

MR. RASKAUSKAS: Yes, sir. I understand, and certainly, Your Honor, the fact that we cannot accept this statement is because we cannot accept the affidavits which have nothing to do with the credibility certainly of Mr. Houston and Mr. Helms.

THE COURT: I understand. Then there is no question that the statement, his statement and the motion to strike is not on grounds of competency but is on grounds of

relevancy, materiality and right to attack privilege rather than competency.

MR. RASKAUSKAS: Well, it would go even further, Your Honor, and to state that it is just a gratuitous statement, and Mr. Houston is not a witness at this time.

Now, if he wants to take the stand and answer as to the questions of pay for 1963 and 1964 we would be delighted for him to take the stand.

THE COURT: Well, you say you do not care about, if he took the stand and he would be asked, he would make the answer to that one question, I take it, and then would claim privilege from anything further, and the question then is should the Court accord that privilege.

That is why I want to know what I am to rule on. I understand I am ruling on it on relevancy and materiality and not because it is not sworn to. I mean your taking his statement as though he has sworn to it but preserving every other objection including competency; is that right?

MR. RASKAUSKAS: Yes. Yes, Your Honor.

THE COURT: Everything except not sworn to. All right.

That means it is not necessary to file

another affidavit. Another affidavit would add nothing to the point. It would add or subtract nothing from your point.

MR. RASKAUSKAS: That is correct. I get Your Honor's point, the fact of being under oath or not under oath, no, is not our contention.

THE COURT: All right. That is all I wanted. I wanted you to have every other point, but I think it is foolish to waste the time.

MR. RASKAUSKAS: I agree.

THE COURT: --on just putting things under oath when you are dealing with people whose word you can take.

All right.

MR. RASKAUSKAS: Now, we have pending a question.

THE COURT: All right, the question is, well, in view of the instructions they have given him that he was paid indirectly by CIA during the time in question I will allow since CIA said it, you may ask him if that is--since Mr. Houston has said it, you may ask the defendant if that is true and just let him answer yes or no.

You heard what Mr. Houston said.

THE WITNESS: Yes, sir.

THE COURT: Is that true?

THE WITNESS: Yes, Your Honor.

THE COURT: And I will then sustain further objections on the ground that the interest of the United States to my mind on this one are weightier than the interest of allowing the question to be answered, and of course, you have your exception to the Court's ruling.

You understand I am giving you your exception? You have exceptions without taking them.

MR. RASKAUSKAS: Yes, Your Honor.

THE COURT: --to the Court's ruling so that if it is necessary at any time, whatever the result of this hearing is, if either side appeals, you will be able to raise your point in that you have objected.

MR. RASKAUSKAS: Very well, Your Honor.

Has Your Honor ruled on my pending question as to whether or not the salary in the approximate amount of $8700 which he received as a GS-11 in 1963 as a highway engineer for the Bureau of Public Roads, Department of Commerce, was salary that was paid to him fully for his duties in that posicion?

THE COURT: That is right. I am sustaining that objection. I think it is immaterial whether he was given leave of absence from his duties as a research engineer of the Bureau of Public Roads for a week or a month or parts of weeks or months in order to do work for

the CIA during that period that he was paid, whether he was paid directly or indirectly by the CIA, is a question in which the interest of the Government and the rights of the Agency under Section 403 (g) and under the cases as I interpret them require me to sustain the objection.

MR. RASKAUSKAS: Thank you, Your Honor.

BY MR. RASKAUSKAS:

Q Will you state the sum you were paid for your duties as a reserve officer during the calender year of 1963?

MR. MARONEY: May we indulge you a moment?

THE COURT: Yes.

MR. CONNOLLY: May we have the question read back, Your Honor? We have a dispute as to the question.

THE COURT: It seems to be the same question that I allowed for 1965.

MR. PRETTYMAN: It may not be, Your Honor. That is what we were talking about.

THE COURT: Oh.

MR. MARONEY: As to the amount he received for his reserve, military reserve activities, we have no objection to.

THE COURT: All right.

THE WITNESS: I do not recall exactly but I estimate about two hundred dollars.

BY MR. RASKAUSKAS:

Q Now, other than the $8700 that you received from the Bureau of Public Roads and the approximate amount of $200 which you received from your reserve unit, what other income did you have during 1963?

MR. MARONEY: Objection, Your Honor.

THE COURT: On what grounds? I mean, are you asserting the privilege?

MR. MARONEY: Yes, sir.

THE COURT: I mean you are asserting privilege on that?

MR. MARONEY: That is right. Anytime I object, Your Honor, it is only on the grounds of privilege.

THE COURT: All right.

Is there any reason for him not to state anything he may have made from writing articles or periodicals or any perfectly private activities?

MR. PRETTYMAN: He did not ask the question relating to private activicies, Your Honor.

THE COURT: Did he say that?

MR. PRETTYMAN: No, sir.

THE COURT: It was all government?

MR. PRETTYMAN: It was an all inclusive question.

THE COURT: If you want to ask him other--I

I will sustain the objection as to additional compensation he received from the government.

If you want to ask him whether he received additional compensation through tutoring or pushing a lawn mower for somebody else or--

MR. CONNOLLY: I object to that on materiality grounds, Your Honor.

THE COURT: Well, I do not think there is any need--I would overrule the objection on materiality grounds.

I will sustain the objection so far as additional money from the government is concerned if he made additional outside income and if he was paid a salary by the Estonial Legion or something that he worked on, and I understand he was some sort of an officer of some organization which has not been stated to be a governmental agency.

If he was paid something for being secretary of that or treasurer of that or president of that, I think there is no reason he should not state that. So that I would overrule the objection unless there is some further argument with respect to sources of income other than from the government and will sustain the objection with respect to sources of income from the government.

MR. RASKAUSKAS: Your Honor, I asked him a

question about all sources. I did not specify from the government.

THE COURT: All right. If you do not want it as cut down by the Court--

MR. RASKAUSKAS: Yes.

THE COURT: You can withdraw it.

MR. RASKAUSKAS: Well, I--

THE COURT: I understand you asked it broadly.

MR. RASKAUSKAS: Broadly.

THE COURT: And I will sustain the objection to it broadly because it includes government, and as I say, if you want to ask it for non-government income I will overrule the objection.

MR. RASKAUSKAS: Yes, Your Honor, but I wanted to make the record clear and state that I want to ask it as to government income.

THE COURT: Yes, and the objection to that has been sustained.

MR. RASKAUSKAS: All right. Very well.

BY MR. RASKAUSKAS:

Q Did you file a federal income tax return for the calender year of 1963?

MR. MARONEY: No objection, Your Honor.

THE WITNESS: Yes.

BY MR. RASKAUSKAS:

Q Would you state the gross income which you reported on that return?

MR. MARONEY: Object, Your Honor.

THE COURT: You can't get by the back door what you can't get by the front door.

MR. RASKAUSKAS: Will Your Honor indulge me for a moment, please?

THE COURT: Yes.

MR. RASKAUSKAS: Now, in the interest of expediting the matter, Your Honor, with respect to the calender year 1964 I would like to propound the same questions?

THE COURT: All right.

MR. MARONEY: We object.

THE COURT: And he may answer what he got from the Bureau of Public Roads in 1964, what he got from the reserve in 1964, and if you want what he made outside in 1964; but you have not asked him.

MR. RASKAUSKAS: No, I have not.

BY MR. RASKAUSKAS:

Q Would you state your employment--was it with the Bureau of Public Roads in 1964?

A Yes.

Q And what was your salary?

A Approximately $10,200 a year.

Q What was your grade?

A Partly GS-11 and GS-12.

Q What was your occupation with the Bureau?

A Highway research engineer.

Q Did you maintain the same position with the Bureau of Public Roads in 1964 as you did in 1963 except for a change in your in-grade and elevation in salary?

A Yes.

Q Now, was all of the salary which was paid to you in 1964 by the Bureau of Public Roads? To you for your performance of duties as a highway engineer?

MR. MARONEY: Objection, Your Honor.

THE COURT: Sustained.

BY MR. RASKAUSKAS:

Q Were you a member of a reserve component of the Armed Forces in 1964?

MR. MARONEY: I wonder if the question might be limited, Your Honor, to were you a member of the military reserve and see where we go from there, the Army Reserve?

THE COURT: Yes.

MR. RASKAUSKAS: Very well. I will withdraw the question.

BY MR. RASKAUSKAS:

Q Were you a member of the United States Army Reserve in 1964?

A Yes.

Q And of what unit were you a member?

MR. MARONEY: Objection.

THE COURT: You object? Who is objecting?

MR. MARONEY: The Government is objecting on the basis of security considerations, Your Honor.

THE COURT: Sustained.

BY MR. RASKAUSKAS:

Q What was your income with the branch of the reserve unit for 1964?

A Approximately eight hundred dollars.

Q Did you file a federal tax return for 1964?

A Yes.

Q Will you state the gross amount of income you reported on said return?

MR. MARONEY: Objection.

THE COURT: Sustained.

BY MR. RASKAUSKAS:

Q Will you state whether or not you received any other income from the United States in 1964?

MR. MARONEY: Object.

THE COURT: Sustained. Well, no, I suppose

it should be allowed to the same extent that he was allowed to say whether--well, he said what Mr. Houston said was correct. I do not know whether that covers both '63 and '64 or not. It was a general statement.

MR. MARONEY: Mr. Houston's statement was "during the times in question."

THE COURT: So it would be at least part of or during the time, during the material parts of '63 and '64.

MR. MARONEY: Yes, sir.

THE COURT: All right. That answer was yes. That covers that. That has already been answered as far as I will allow it to be answered.

MR. RASKAUSKAS: Well, I would like to make the record abundantly clear, Your Honor, that we do not consider that an answer to any question, the statement that Mr. Houston made.

We can only treat that as a conclusory statement because we cannot relate it to anything.

THE COURT: Well, the witness has stated that what Mr. Houston said was true, and I can't allow you to ask him anything further.

MR. RASKAUSKAS: Yes. Well, I did not ask that question of the witness, Your Honor, as to his comment on what Mr. Houston said.

THE COURT: Well, maybe the Court did.

MR. RASKAUSKAS: The Court did.

THE COURT: Well, that is as far as I will allow it to go.

MR. RASKAUSKAS: Yes, Your Honor.

THE COURT: And it will be helpful to the Court.

BY MR. RASKAUSKAS:

Q When were you first employed by the Bureau of Public Roads?

A In January 1963.

Q Have you been with the Bureau of Public Roads continuously since January of 1963?

A Yes.

Q When did you make your first contact with the Central Intelligence Agency?

MR. MARONEY: Object, Your Honor.

THE COURT: Sustained.

BY MR. RASKAUSKAS:

Q Now, Mr. Raus, will you state, or will your counsel state on your behalf respecting the ninth defense to your answer, "On those occasions specified in Paragraphs 5, 6, and 7, of the complaint, the defendant was in possession of information furnished to him by the Central Intelligence Agency, and when he spoke concerning the

plaintiff on such occasions he was acting within the scope and course of his employment by the Agency on behalf of the United States. Accordingly the statements made by him on such occasions were absolutely privileged."

Would you or your counsel answer at this time whether or not you will answer any questions whatsoever propounded to you relative to this ninth defense?

MR. CONNOLLY: Your Honor, our position is quite clear that the defense is asserted on the basis of Mr. Helms' affidavit and the injunction given to Mr. Helms--to Mr. Raus by Mr. Helms in the second affidavit and by Admiral Raborn in the statement of privilege which was filed this morning and by virtue of the provisions of the secrecy agreement, which is in the record, and the provisions of the espionage laws of the United States.

We will however permit him to state whether or not the statements of Mr. Helms contained in the first, second, and third affidavits subject to Mr. Houston's permitting him to do that, whether the statements in those affidavits are true or not.

THE COURT: Well, all right. I understand your position. Let's find out exactly what the plaintiff wishes him to answer. The defendant now on the stand should not answer anything.

Why don't you state the question and let the defense counsel and the Government see what can be done. It seems quite apparent to me that the CIA cannot be required to disclose the sources from which it got this information which it says it passed on to the defendant.

That obviously would be security matters, and I think it can hardly be, subject to argument, but there may be some border line questions which might fall on the other side, and if you can tell us the questions you wish to ask I would rather rule on the specific questions rather than this general statement.

MR. EASKAUSKAS: Very well then, Your Honor. I determined on a general question in order to conserve the time of the Court, and in as much as the questions about salary, the broadest question, on that, privilege was claimed I did not see how anything relevant that we were interested in because we are not interested in those little incidental things like writing an article or cutting the grass. We are interested in that which is germane.

THE COURT: Well, I gather that you do not wish to be more specific than that?

MR. RASKAUSKAS: Yes, I will be more specific, Your Honor. I just stated the reasons for asking a very general question.

THE COURT: Unless you are more specific I

hardly know how I can rule.

BY MR. RASKAUSKAS:

Q Now, will you state whether or not on November 9, 1963 in New York at a special meeting of the Board of the Legion of Estonian Liberation in the presence and hearing of one Aleksander Allikas and one Elmar Keerd and other persons, did you state at that time"that Eerik Heine is a communist" and "Eerik Heine is a KGB Agent", and did you attribute that statement to the Federal Bureau of Investigation?

MR. PRETTYMAN: Wait a minute. We have a couple of questions here.

THE COURT: All right.

MR. PRETTYMAN: Break it down.

MR. RASKAUSKAS: I will break it down.

THE COURT: You mean did he--

MR. RASKAUSKAS: I will break it down, Your Honor.

THE COURT: You mean did he make the statements before the attribution?

MR. RASKAUSKAS: Yes.

BY MR. RASKAUSKAS:

Q Did you attend such a meeting on November 9, 1963?

A Yes.

Q Did you make a statement at said meeting?

A Yes.

Q At that meeting did you say that Eerik Heine was a KGB Agent?

MR. MARONEY: No objection, Your Honor.

THE WITNESS: Yes.

BY MR. RASKAUSKAS:

Q At that meeting did you state that the source of your information was the Federal Bureau of Investigation?

MR. MARONEY: No objection, Your Honor.

THE WITNESS: No.

BY MR. RASKAUSKAS:

Q You deny that?

A Yes.

Q Did you state you received the information which you conveyed at that meeting from any official government source?

MR. PRETTYMAN: The question is, from any official government source. You mean naming the source?

THE COURT: The question is perhaps ambiguous. Did he say he got it from government authority or did he say he got it from a specific government agency. The question is ambiguous.

BY MR. RASKAUSKAS:

Q Did you state you received this information

from a specific government agency?

A No.

Q Did you state that you received this information from official sources?

A Yes.

Q Did you name the official sources?

A No.

Q At that meeting did you ever use the words "Federal Bureau of Investigation"?

A Yes.

Q Did you ever use the initials "FBI"?

A Yes.

Q Would you explain how you used those words and initials at that meeting?

A I stated that whoever does not believe what I said is free to contact the Federal Bureau of Investigation.

Q Did you state anything further about the Federal Bureau of Investigation?

A No.

Q Did you make this statement on the basis of information supplied to you by the Federal Bureau of Investigation?

THE COURT: Wait a minute before you answer. I gather they want to confer or think about it.

MR. PRETTYMAN: May we have the question read

back?

(The last question was read by the Reporter.)

THE COURT: Which information?

MR. RASKAUSKAS: Well, I will clarify that. I am asking him, Your Honor--

THE COURT: You say who may have--you see you have gotten several steps from the important statement, and I am not sure whether this question refers to the alleged slanderous remarks or to what he has said about "take it up with the FBI."

MR. RASKAUSKAS: I believe the witness has stated that he advised certain people at this meeting that if they did not believe the statements he made about Eerik Heine that he was a KGB Agent, that they could check with the FBI.

THE COURT: That is right. Is that what you want to know?

MR. RASKAUSKAS: Now, I was asking him to state whether or not he was furnished information by the Federal Bureau of Investigation specifically that Eerik Heine was a KGB Agent?

MR. MARONEY: No objection, Your Honor.

THE WITNESS: No.

BY MR. RASKAUSKAS:

Q Theretofore, prior to November 9, 1963, had you

at any time had a conference with any representative of the Federal Bureau of Investigation concerning Eerik Heine?

MR. MARONEY: Objection, Your Honor.

MR. CONNOLLY: If Your Honor please, this is in an area, and I must say that in my conferences with the witness I do not know what the answer is because I do not know whether I covered this particularly because I do not remember it, and I wonder if we may have a conference because we have a dispute as to whether or not we get into this sensitive area or not?

THE COURT: Well, I am not quite clear.

MR. MARONEY: May the Government object, Your Honor, on the basis, object to the materiality of his conferences with another government investigative agency?

THE COURT: Well, is it materiality? I do not think that materiality is the reason. It seems to me that privilege might be, if you claimed that any talks he has had with the FBI was or might have been in the course of his duties for the CIA,I think that might be a valid claim of privilege.

I would consider that; I do not want to make a ruling on it. Let me say that I think that anyone who has read the newspapers in the last ten years knows that at one time or another there has been some public discussion about the functions of the FBI and the functions of the CIA,

and there have been suggestions, whether warranted or not, in the press that there was a certain feeling between certain persons in the agencies.

Now, this Court is not the forum in which any such matters should be threshed out. I would think that a claim of privilege, if there is a bona fide claim of privilege, might be sustained. I do not see that a claim of materiality could be sustained. If the case gets by the privilege point it would seem that this might become a matter which could be considered on the merits of the case, I would think, not from what he has said but on what I know from the papers that I have read in the case that it is what the plaintiff claims, and I think there is a claim of some statement from the FBI, the FBI knew nothing about it, or words to that effect, that the FBI had nothing against the plaintiff, or words to that effect. There is something like that in the papers.

MR. CONNOLLY: As long as that has been stated by Your Honor we want to make it clear that we do not agree with that part of the assertion.

THE COURT: I understand. I have to look at this case on what the allegations are and what has been offered by both sides, and I can't look only at--

MR. CONNOLLY: This is why I raised the question of materiality, Your Honor. The pleadings, the

complaint make no reference to the FBI. I think it is therefore not appropriate to come into this case, and I do not want my silence to be taken as consent.

THE COURT: You mean this has been dragged in since the complaint?

MR. CONNOLLY: Yes, Your Honor. We have not filed any--

THE COURT: Dragged in since the complaint. I remember seeing it in the recent answers filed by the plaintiff. I have not checked heretofore to see whether it was in the complaint.

MR. RASKAUSKAS: Your Honor, it was not specified in the complaint, and the federal rules do not require that such a fact should be specified in the complaint. The complaint should be a plain statement of the allegations which the plaintiff made, and I think we have that in our complaint, and we are satisfied with it.

THE COURT: All right.

Now, would you read the question again, Mr. Owens, or would you propound the question again so that counsel can tell me what position they take on it and so the Court may rule on it after I have heard that argument?

MR. RASKAUSKAS: May the Reporter read that question?

THE COURT: It is a long way.

(The last question was read by the Reporter.)

MR. CONNOLLY: Your Honor, normally, of course, counsel would not consult with the witness on the stand. The difficulty here is that he may have information which we do not have with respect to matters affecting national security, and I wonder if you are going to overrule the other objection, and perhaps--

THE COURT: It seems to me that under the circumstances it is appropriate for the witness to state privately to his counsel and to Government counsel what his answer would be so that they may know whether to object or not, particularly if the Government counsel, as I think it important, I think his counsel are entitled to hear it, and Government counsel are entitled to know what the answer would be before they decide whether to object or not in view of the statement that has been made by Mr. Prettyman, and I suppose Government counsel have no greater knowledge than Mr. Prettyman would have.

MR. KENNEY: If you are going to do it, I think you had better do it in the anteroom.

(The witness left the stand.)

THE COURT: The anteroom is occupied by--the main anteroom is occupied by someone who is working for me on another case. So you can just use the robing room, and

that will be all right.

(Short pause in proceedings.)

MR. CONNOLLY: Your Honor, I think this is a matter we should take up at the bench outside of the presence of anybody.

THE COURT: All right, come up here. Do you want it on the record or off the record?

MR. KENNEY: Off the record.

MR. CONNOLLY: I do not much care which.

THE COURT: Well, at the request of counsel for the Government and at their request, I will hear it in chambers, and if anybody wants it on, all right.

MR. STANFORD: If we feel it is necessary at that time, we can put it on the record after the discussion.

THE COURT: Of course.

(Thereupon, there was a short recess taken, after which the following occurred:)

THE COURT: There is a question before the Court. The witness has been asked, I gather, whether he discussed the matter generally with the FBI before the meeting in November 1963 to which reference has been made.

Is that the question? Is that substantially the question?

MR. RASKAUSKAS: I have to apologize, Your Honor.

THE COURT: Is the question which is now before the Court for ruling if objection is made whether the defendant, the witness, had discussed the general subject with the FBI at any time before the November 1963 meeting?

MR. RASKAUSKAS: Yes, Your Honor.

THE COURT: Is there any objection to it?

MR. MARONEY: No objection, Your Honor.

THE WITNESS: Yes.

BY MR. RASKAUSKAS:

Q When did you discuss this matter with the FBI prior to November 9, 1963?

MR. MARONEY: Your Honor, we have to interpose an objection at this point. I wonder if I might take an additional minute to talk to Mr. Raus?

THE COURT: All right.

MR. MARONEY: We misunderstood his answer when we were talking to him previously outside.

THE COURT: All right.

(Witness left the stand.)

MR. PRETTYMAN: The question was changed.

THE COURT: The question changed?

MR. PRETTYMAN: Yes, sir.

THE COURT: You mean I asked a different question?

MR. CONNOLLY: I will be happy to tell you why, Your Honor.

THE COURT: I gather I changed your question just a little from what counsel stated. Maybe we had better have--well, maybe the answer will straighten it out. My question was different from yours.

MR. MARONEY: I am sorry, Your Honor.

THE COURT: All right. Does someone wish to make a statement or shall we wait for the next question?

MR. MARONEY: Oh, I think we have to wait for the next question, Your Honor.

THE COURT: All right.

(The Witness returned to the stand.)

BY MR. RASKAUSKAS:

Q Prior to November 9, 1963 were you furnished any information by the Federal Bureau of Investigation specifying that Eerik Heine was a KGB Agent?

MR. MARONEY: No objection.

THE WITNESS: No.

BY MR. RASKAUSKAS:

Q Prior to November 9, 1963 at any time did you have a conference with any representative of the FBI concerning Eerik Heine?

MR. MARONEY: No objection.

THE WITNESS: Yes.

BY MR. RASKAUSKAS:

Q Was this conference at your request or at the request of a representative of the FBI?

MR. MARONEY: Objection, Your Honor.

THE COURT: That is an objection by the Government? Is it an objection by the Government or by the--

MR. MARONEY: By the Government, Your Honor.

THE COURT: Sustained.

MR. RASKAUSKAS: The objection is sustained to at whose request?

THE COURT: The Government.

MR. RASKAUSKAS: Or the FBI?

THE COURT: No, not the FBI, by the Government. Well, I take it it is the CIA.

MR. RASKAUSKAS: No, I mean as to that question as to who initiated--

THE COURT: Yes, who initiated the conference, and the Government has objected.

MR. RASKAUSKAS: And at this point I would like to have Mr. Maroney specify on whose behalf he is making the objection, whether on behalf of the CIA or the FBI?

MR. MARONEY: On behalf of the United States, Your Honor.

MR. RASKAUSKAS: Well, I believe that the case that Your Honor cited, U.S. vs. Reynolds, holds that a formal claim of privilege must be lodged with the Court by the head of an agency; and we do not have a formal claim of privilege here lodged with the Court by the Attorney General or the FBI of the United States or by the Director of the FBI, and I therefore feel that we are entitled to know on whose behalf this claim is made, in accordance with this Supreme Court decision which Your Honor cited to us.

MR. CONNOLLY: The trouble with that matter, that is immaterial to this lawsuit, who initiated the inquiry because he has not sued on anything that Mr. Raus said for the FBI.

THE COURT: Well, I think the objection, the objection, the claim of privilege is made on behalf of the United States by the head of the Agency, namely, the head of the CIA, the claim that has been filed today formally.

Now, the attorney for the Department of Justice makes the objection on behalf of the United States in support of that claim of privilege and not in support of any other claim of privilege.

Do I understand it correctly? In support of the claim of privilege that has been made, not in support of some claim of privilege that might be made.

MR. MARONEY: That is correct.

THE COURT: If it is in support of some claim of privilege which might be made I guess we are going to have to hear from Mr. Katzenbach.

MR. MARONEY: I think it is in support of this claim of privilege, but I think that an additional claim of privilege could be made by the Attorney General, and I would request that the Court not require an answer without authorization from the Department.

THE COURT: Well, I do not want to hold up. Perhaps you could call Mr. Katzenbach at lunchtime and find out whether--the simple thing would be whether he would authorize you to make a claim on behalf of the FBI, but if you make it on behalf of the CIA, I mean, if you make it on behalf of the United States, as you accurately stated.

MR. MARONEY: Yes, sir.

THE COURT: In support of the claim of privilege, asserted by the head of the CIA, the Court will sustain it.

MR. MARONEY: Yes.

THE COURT: Or you make it on two bases,

MR. MARONEY: We do. We do make it under this claim of privilege that is on file with the Court, Your Honor, and I think it is supportable under the claim already made concerning his activities.

THE COURT: Or because it might disclose some of his activities as an agent of the CIA obviously.

MR. RASKAUSKAS: Would Your Honor listen to argument on this point?

THE COURT: Certainly.

MR. RASKAUSKAS: Your Honor, U.S. vs. Reynolds holds that the head of an executive branch of the government after personal review must formally lodge the complaint. Now, I hardly know whether the head of the CIA anticipated this question regarding the FBI, and I think we are entitled to some substantial justification by counsel here as to on what basis the CIA claims the privilege on conferences that this man had with the FBI.

I think we are entitled to an answer.

THE COURT: Well, it is my understanding that the claim of privilege does not mean that the head of the agency must know every possible question which may be asked. You state the general grounds of privilege, and the Court must rule on the point raised by counsel as to whether they seem sound.

We have the general counsel of the CIA here, I think, and since this objection was made by someone from the Department of Justice, it seems that the duty of the courts would be served by asking Mr. Houston, General

Counsel of the CIA, whether he has authorized or whether he approves the making of this objection in support of the privilege of the United States claimed by the head of the CIA.

MR. HOUSTON: The answer to that question is yes, sir.

MR. RASKAUSKAS: Your Honor, may I make this inquiry? These gentlemen did not know what this witness' answer was going to be before he made it.

It required two conferences off the stand, and I think it gets us into the area of patent absurdity, and I said to the Court earlier that we are interested in national security and we are not going to be presumptuous about the claim of privilege because I firmly believe that the Executive Department has a privilege where State secrets are involved.

This is the law, and we affirm it; but in this particular situation I think we are entitled to have this claim asserted by the Director of the Federal Bureau of Investigation or by the Attorney General of the United States and not by the particular counsel that happened to be in court at this hearing.

THE COURT: In effect, let me say two things: In the first place the two conferences are made necessary

because at the end of the long discussion the Court attempted to rephrase the question that had been asked by the plaintiff and apparently rephrased it with just enough difference to produce a different answer.

I think that has been clarified. Now, the objection, as I understand it, is now made, you say not by Justice counsel, the particular counsel that happened to be here. The United States Attorney is here, and the Court looks upon the United States Attorney to take the responsibility for speaking for the Government in cases in this Court.

If he allows, and very appropriately, we are happy to have someone from the Washington office of the Department of Justice here, if he makes an objection with which Mr. Kenney does not agree and which Mr. Kenney cannot associate himself I expect Mr. Kenney to say so.

He speaks for the United States. In this case we are fortunate in having the general counsel of the Agency that asserted the privilege on behalf of the United States. He has stated that on behalf of the United States. He has stated that on behalf of the United States in support of the privilege of the United States which has been asserted by the head of the Agency of which he is general counsel, he feels that this question should be

objected to on the grounds of privilege.

For that ground and with the understanding that Mr. Kenney associates himself with it--you do, Mr. Kenney?

MR. KENNEY: I do indeed, Your Honor.

THE COURT: On those grounds the Court will sustain the objection.

MR. RASKAUSKAS: Very well, Your Honor.

THE COURT: And you have your clear appealable ruling?

MR. RASKAUSKAS: Yes, Your Honor.

BY MR. RASKAUSKAS:

Q Prior to the meeting of the Board of the Legion of Estonian Liberation on November 9, 1963 did you participate in a series of conferences concerning Eerik Heine with representatives of the Central Intelligence Agency?

MR. MARONEY: No objection.

THE COURT: What is the date?

MR. RASKAUSKAS: Prior to November 9, 1963.

THE COURT: All right.

THE WITNESS: Yes.

BY MR. RASKAUSKAS:

Q When was the first such conference?

MR. MARONEY: Can we have a moment, Your Honor?

THE COURT: Yes.

MR. MARONEY: The Government objects, Your Honor.

THE COURT: Why is the date important if you have the facts?

MR. RASKAUSKAS: The date is important because we would like to know with whom he had the conference, when, when he was first supplied such information.

THE COURT: Let the Government make a list of what you want. When, with whom--go ahead--so we can see what they will agree to and what they will object to. When and with whom? Are those the two things you want?

MR. RASKAUSKAS: Your Honor, there are a series of questions which we would like to ask on that subject.

THE COURT: You had better take them one at a time. Take them one at a time then.

MR. RASKAUSKAS: Does Your Honor ask this question of me for the purpose of getting what our line of reasoning is?

THE COURT: Yes, I want to get your line of reasoning so that they can decide where they want to draw the line.

MR. RASKAUSKAS: All right.

THE COURT: In the beginning, at the middle, or at the end.

MR. RASKAUSKAS: Well, we would ask then (1) when was the first conference held, (2) how many participants were there, (3) who initiated the conference, (3) did they come to him, did he go to them, (4) what was discussed, (5) what facts were stated about Eerik Heine, (6) what the discussion was, (7) was he then given an opportunity to become an informer for the CIA or a casual contact or what his relationship was.

All of this we would like to develop, and we felt the sequential way was to start with the first conference, which would be the most appropriate way.

MR. MARONEY: To each one of those indicated questions, Your Honor, the Government would interpose an objection on the basis of Admiral Raborn's statement with respect to secrecy.

MR. RASKAUSKAS: All right. To make the record abundantly clear, (1) the next question we would like to ask is, the position of the person who made any statements that were made to him about Eerik Heine, (2) the authority of that person, (3) and the precise statements that were made.

THE COURT: You mean were made to the witness before the meeting of November 3rd?

MR. RASKAUSKAS: Yes, at the first--

THE COURT: You want to know who authorized him to make the statements which he made at the November--

MR. RASKAUSKAS: Exactly what information was supplied to him. Those are the questions.

THE COURT: All right.

MR. MARONEY: We object to all the questions, Your Honor.

MR. RASKAUSKAS: Any other further questions then would be an imposition upon the Court, and we therefore would not ask them.

THE COURT: All right. Let me get again. Mr. Houston, you are asserting the privilege?

MR. HOUSTON: Yes.

THE COURT: Of the United States on the assertion made by the head of your Agency?

MR. HOUSTON: That is correct, Your Honor.

THE COURT: Mr. Kenney, are you associating yourself with this?

MR. KENNEY: Yes, sir.

THE COURT: I will sustain the objection. I think I am required to do so as I understand the rulings of Reynolds and the other cases.

MR. RASKAUSKAS: Yes, sir.

Well, out of an abundance of caution I would like to put on the record the statement that the plaintiff

at this time elects to terminate the deposition of the defendantbecause the claim of privilege precludes inquiry into any matters which we consider relevant at this time.

THE COURT: All right.

MR. RASKAUSKAS: Thank you.

MR. CONNOLLY: Now, may the witness be excused, Your Honor.

THE COURT: Do you wish to ask him any questions?

MR. CONNOLLY: No questions.

THE COURT: Well, I guess there is nothing more we can do in this part of the day.

MR. CONNOLLY: I think I would like to ask this question.

THE CLERK: Wait a minute, Mr. Raus.

MR. CONNOLLY: Maybe the United States would object.

CROSS-EXAMINATION

BY MR. CONNOLLY:

Q Have you read the three affidavits filed by Richard Helms and filed by us in your behalf in this case?

A Yes.

MR. RASKAUSKAS: I object to that.

THE COURT: On what grounds? There can't be any objection whether he read them, can there?

MR. RASKAUSKAS: Mr. Stanford will answer that, Your Honor.

THE COURT: All right.

MR. STANFORD: Your Honor, the statements of Mr. Helms are not subject to cross-examination. If Mr. Raus affirms those statements here his affirmation is not subject to cross-examination.

This is patently clear because Mr. Raskauskas has just addressed to him all of the contents of the essential paragraphs of those three affidavits, and the privilege has been claimed.

Therefore, we do not think it is proper for the defendant in this case to try to get mileage out of a mere affirmation of an affidavit which has been filed.

THE COURT: I understand. I think you are objecting to the next question and not to this one.

The question is has he read them, and counsel as a matter of personal privilege might want that one with respect to having done something without their client's knowledge.

MR. RASKAUSKAS: Your Honor, if he gives an answer to this next question we respectfully then demand to have a full cross-examination in view of his answer.

THE COURT: You do not mean the immediate one, the one that follows?

MR. RASKAUSKAS: The self-serving answer that is coming, Your Honor, and we think we have a right to that.

THE COURT: I understand. He is going to say he read it. The question is, is it true? That is going to be that question.

MR. CONNOLLY: May we have an answer to the pending question? I think his answer is yes. Is it?

THE COURT: I think he said he read them. Now, that is that.

BY MR. CONNOLLY:

Q Now, do not answer the question, Mr. Raus, until everybody along the line of tables here has a chance to interpose an objection, if they care to do so.

THE COURT: Yes.

BY MR. CONNOLLY:

Q Tell the Court whether or not the statements of fact therein contained are true or not true, to the best of your knowledge?

THE COURT: Hold up. Do not answer.

MR. RASKAUSKAS: Now, I would ask Your Honor to rule on this question irrespective of what his answer is, yes or no, that we will have a right to full and complete cross-examination of every possible inference that can be drawn from the answer that he is about to give, if he is permitted to answer this question.

THE COURT: Does the Government object?

MR. MARONEY: Well, of course, if Your Honor were to rule that there would be full cross-examination then the Government would object because we would have to continue to interpose the objections previously made.

THE COURT: Well, he has answered part of it at the request of the Court, not the full one, and if you repeat your objection, you want me to make my ruling in advance before you make your objection.

If you make your objection I will sustain it, and since I gather you are making the objection--

MR. MARONEY: We have no objection to his answering.

THE COURT: This one question but with the understanding that if he is allowed to bring that into the case as affirming the truth, in view of the fact that you have already said, I thought I had asked him very much the same question without objection, I asked him a part of it before, but if it is a question of opening up--you object to opening up cross-examination?

MR. MARONEY: Yes, sir.

THE COURT: Well, it seems to me then that the case has to rest on the claim of privilege and not on his affidavit that it is true. It seems to me there are--

MR. CONNOLLY: I think I can resolve this, Your Honor.

THE COURT: It may be a thinner question. It may be a thinner question if he would, if the CIA claims privilege and says they told him to do these things.

Now, he has alleged that he did the same things, he alleged through his counsel in his answers exactly or substantially the same things that the CIA have put in their affidavits. He has not sworn to it, but it has been signed by his counsel; so that these representations have been made on his behalf.

I do not think there is any such charm to an oath of his saying so that adds very much to it one way or the other.

MR. CONNOLLY: What I want to say, Your Honor, I do not think that the answer to this question is necessary in support of my motion. I asked the question however merely to prevent any adverse inference from it being drawn from the failure to answer the question.

THE COURT: All right.

MR. CONNOLLY: So I do not insist on an answer providing no adverse inference is drawn therefrom.

THE COURT: No, I understand. You have asked the question, and the Government has stated they will object if the Court will allow further cross-examination.

him
I think it would probably be unfair to allow/to answer the question under oath and get any additional advantage which the oath might furnish, which frankly does not seem to me very great, in view of the allegations in the affidavits which have been filed; but I think it would be unfair to allow him to have the additional advantage of a statement of that sort without giving the other side the benefit of cross-examination.

So I will sustain the objection. As I understand it, the Government is claiming the privilege if the Court is going to allow full cross-examination.

MR. MARONEY: Yes.

THE COURT: All right.

MR. MARONEY: I guess the witness may now be excused.

THE COURT: Yes.

THE CLERK: Stand down.

(Witness excused.)

- - -

THE COURT: Now, gentlemen we have just a few minutes before the luncheon recess. Do you wish to argue the motion for summary judgment today or do you wish to argue the motion for summary judgment at some later time, and is the record closed on what is going to be before

the Court on the motion for summary judgment or does either side intend to put anything else in?

MR. RASKAUSKAS: Your Honor, in view of the supplemental memorandum that has been filed today and the formal claim of privilege I think it would be appropriate if we continued this matter for a reasonable period of time.

THE COURT: All right. Now, how long would you want? I am just thinking of the schedule. As a practical matter, unless it is heard next month it probably cannot be heard until August. It is not going to be practicable to hear and decide the case by reason of the fact that I am taking the earliest vacation this year. I will be the first of our Judges to go off and the first to come back, and other tax dockets, other cases that have been set, and one thing and another will make it impractical to hear this between, say, mid-May and the first of August.

We could do it in late May if you need time. We can work it out somehow.

MR. RASKAUSKAS: Your Honor, I think two weeks would be sufficient. I would like to state to the Court that we would like--

THE COURT: Get my book, so I can see my schedule.

MR. RASKAUSKAS: We condidered this opportunity this morning to attempt to take the deposition before the

Court as an accomodation from Your Honor in saving all the counsel a substantial amount of time running back and forth between Washington and Baltimore. Mr. Stanford and I both appreciate that.

THE COURT: Well, as I said before, I appreciate the attitude you have taken toward the Court throughout in calling up about the possible appearances, and so forth.

Let me say this, that I have had the corps of photographers in my chambers and have told them the rules which apply about photographs, that is, that no photographs can be taken in the courtroom, and no photographs can be taken of any party in this federal building without his consent; that if the parties wish to consent that the Court will indicate a place, and the Marshal will take them to a place where photographs can be taken with the consent of the parties. After they get on the street, the streets are free, to the photographers and anybody else.

The photographers have all understood it, and I understand that some people, some of the parties or lawyers or someone have indicated that they have no objection to photographs being taken. I wanted to say that so that everybody might know what the Court had indicated.

Well, two weeks would carry it to Thursday the twelfth. I think we could have it sometime between

Thursday the 12th and Tuesday the 17th. I thought everybody would like to know while you are here.

Off the record.

(Discussion off the record.)

THE COURT: Counsel can have any choice between two possible dates, Thursday, May 12th, and Tuesday, May 17th. I can give you either date.

MR. CONNOLLY: I would prefer the 12th, Your Honor.

MR. STANFORD: I do not prefer either, Your Honor. My disagreement is just because of my schedule, Your Honor. I do have something on that day.

MR. CONNOLLY: Your Honor, there are eight lawyers in a long case, and we have had depositions scheduled now for six weeks, and we have finally agreed on the week of May 16th.

THE COURT: The whole time?

MR. CONNOLLY: The whole week, yes, sir, in New York. The next three weeks are really back breaking weeks.

MR. PRETTYMAN: I will be out entirely during May, sir, but Mr. Connolly can be here sometime.

THE COURT: How about the 13th?

MR. CONNOLLY: The 13th would be wonderful.

MR. STANFORD: The 13th is fine.

THE COURT: How long will you be because that is our short cause day, and we have arraignments, and I think we have thirty some tomorrow, and they have got to be divided between the Judges, and short criminal matters of one sort and another.

MR. CONNOLLY: I tried to make my pleading which I filed this morning, or my memorandum to be concise, and I think I have said just about everything I can say on it. There are not too many cases on this subject.

THE COURT: You think an hour a side will cover it?

MR. CONNOLLY: Yes. That would be all right.

MR. STANFORD: I think that might be a little bit low.

THE COURT: A-half day?

MR. STANFORD: I think a-half day would be all right.

MR. CONNOLLY: I shall not take more than an hour, Your Honor.

THE COURT: Well, would it be convenient to have it in the afternoon?

MR. STANFORD: Yes, sir.

MR. CONNOLLY: Yes, sir.

THE COURT: Two o'clock?

MR. STANFORD: Yes, sir.

MR. CONNOLLY: Yes, sir.

MR. RASKAUSKAS: Yes, sir.

THE COURT: I think we can then run as long as necessary.

MR. STANFORD: Thank you, Your Honor.

MR. RASKAUSKAS: Thank you, sir.

MR. CONNOLLY: Thank you, sir.

(Thereupon, the hearing was concluded at 1:01 o'clock p.m..

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Certified to be a true and correct transcript of the proceedings in the above case.

Francis J. Amato.
Official Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE,)

Plaintiff,)

v.) Civil Action No. 15952

JURI RAUS,)

Defendant.)

SUPPLEMENTAL MEMORANDUM OF THE DEFENDANT
IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

By virtue of the number of charges and emotional appeals put forth by the plaintiff in Court papers and in the press, defendant wishes to restate his legal position upon the pending motion in the simplest and most concise terms.

First, in three consecutive affidavits, Richard Helms, Deputy Director of Central Intelligence, has sworn that on the occasions specified in paragraphs 5, 6 and 7 of the Complaint, when the defendant spoke of the plaintiff, he was acting in the scope and course of his employment by the Agency on behalf of the United States.

Second, the affidavits state that Raus was employed on those occasions specified in paragraphs 5, 6 and 7 of the Complaint to carry out a specific assignment on behalf of the Agency; that he was furnished information by the Agency to carry out his assignment, and that he was instructed by the Agency to disseminate that information. The third affidavit states in categorical terms that the defendant "was instructed to warn members of Estonian emigre groups that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent."

Accordingly, it is clearly established that Raus was acting as a subordinate government employee in the discharge of orders lawful on

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their face. Under such circumstances he possesses absolute immunity from the liability asserted against him. The principle is well established. 8 WIGMORE ON EVIDENCE (McNaughton rev. 1961) §2368 states: "A subordinate or ministerial official -- i.e., one who acts under the orders of a superior official -- is absolutely exempt from liability if the harm done by him is done solely in implicit obedience to an order lawful on its face." Where judgment and discretion may be involved on the part of an official, a defamatory utterance is still absolutely privileged if made within the "outer perimeter" of the employee's duties. This is clearly the rule laid down in Barr v. Mateo, 360 U.S. 564 (1959) and Howard v. Lyons, 360 U.S. 593 (1959) and followed in a number of cases decided by the various Circuits. 1/

Since Raus was acting under specific instructions, the question of whether the Agency was itself acting within the scope and functions entrusted to it by law becomes immaterial.

However, the second and third affidavits of the Deputy Director clearly establish that the Agency's instructions to Raus were within the scope of the functions entrusted to it by law. Title 50, §§ 403(d)(3) 2/ and

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1/ The citations to which are set forth in pages 3 and 4 of defendant's prior memorandum.

2/ §403(d) states:

> "For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council --"
>
> * * *
>
> (3) "to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: Provided, That the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions: Provided further, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: And provided further, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;"

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3/ 403g vest authority in the Director of Central Intelligence to protect the integrity of the Agency's foreign intelligence sources and methods of whatever nature and wherever found. The affidavits of the Deputy Director establish that foreign intelligence sources existed within or were developed through Estonian emigre groups. Accordingly, there can be no dispute concerning the fact that the Agency's undertaking with respect to these matters was within the "outer perimeter" of its statutory authority.

Concerning, therefore, the question of absolute privilege of the defendant, the matter has been summarized by the Supreme Court in Garrison v. Louisiana, 379 U.S. 64 (1964), "Federal officials enjoy an absolute privilege for defamatory publication within the scope of official duty, regardless of the existence of malice in the sense of ill-will."

The foregoing matters are quite distinct and apart from the question of the government's claim of an evidentiary privilege to protect state secrets in the form of foreign intelligence sources and methods. This is a privilege which does not essentially concern the defendant, except as the defendant points to the government's claim of privilege in this regard to satisfy the Court that no further information will be available to the plaintiff from government sources upon which he might dispute the defendant's evidence of Agency employment and direction.

3/ §403g provides:

> "In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this Title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: Provided, That in furtherance of this section, the Director of the Bureau of Budget shall make no reports to the Congress in connection with the Agency under section 947(b) of Title 5.

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The existence of such a privilege on behalf of the government "has never been doubted," as part of the common law of evidence.[4/] The cases are collected in 8 WIGMORE, supra, at pp. 794-795. The privilege, of course, cannot be gainsaid where it is expressly declared by statute. See 8 WIGMORE, supra, §799. 50 U.S.C. §403g provides that "the Agency shall be exempted from . . . the provisions of any other law which require publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency."

As a consequence, defendant's affidavits clearly establish the facts necessary to support his immunity from liability in this suit, and as long as the Agency claims an evidentiary privilege to protect United States intelligence information, the plaintiff is denied access to any other information within the control of the government. This is not a strange result, despite the plaintiff's outcry that the procedure is unfair. All privileges, whether recognized by the common law, set forth in statutes or found in the Constitution, have recognized that their very existence may well deprive an adversary of his means of proof and thereby impair to that extent the judicial search for truth, but it is thought that society is better served by recognizing the privilege than by a disclosure of the facts which might be developed except for the privilege. The Lord Chancellor, Viscount Simon, puts the matter extremely well in Duncan v. Cammell, Laird and Co., [1942] A.C. 624, 643: "After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation."

4/ See Rule 33, Uniform Rules of Evidence and Rule 227 of the Model Code of Evidence.

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Any rule which would impose liability on the defendant in this case would expose every agent of the Central Intelligence Agency throughout the world to the peril of an adverse judgment in a law suit against him, no matter how ill-founded, simply because the agent is prevented by the nature of his job from defending himself by setting forth the complete intelligence concerning the claimant.

Respectfully submitted,

/s/ PAUL R. CONNOLLY

Paul R. Connolly
5411 Albemarle Street
Westmoreland Hills
Washington, D. C. OL 2-5851

/s/

E. Barrett Prettyman, Jr.
3708 Bradley Lane
Chevy Chase 15, Maryland OL 6-7289

Attorneys for Defendant

OF COUNSEL:

Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

CERTIFICATE OF SERVICE

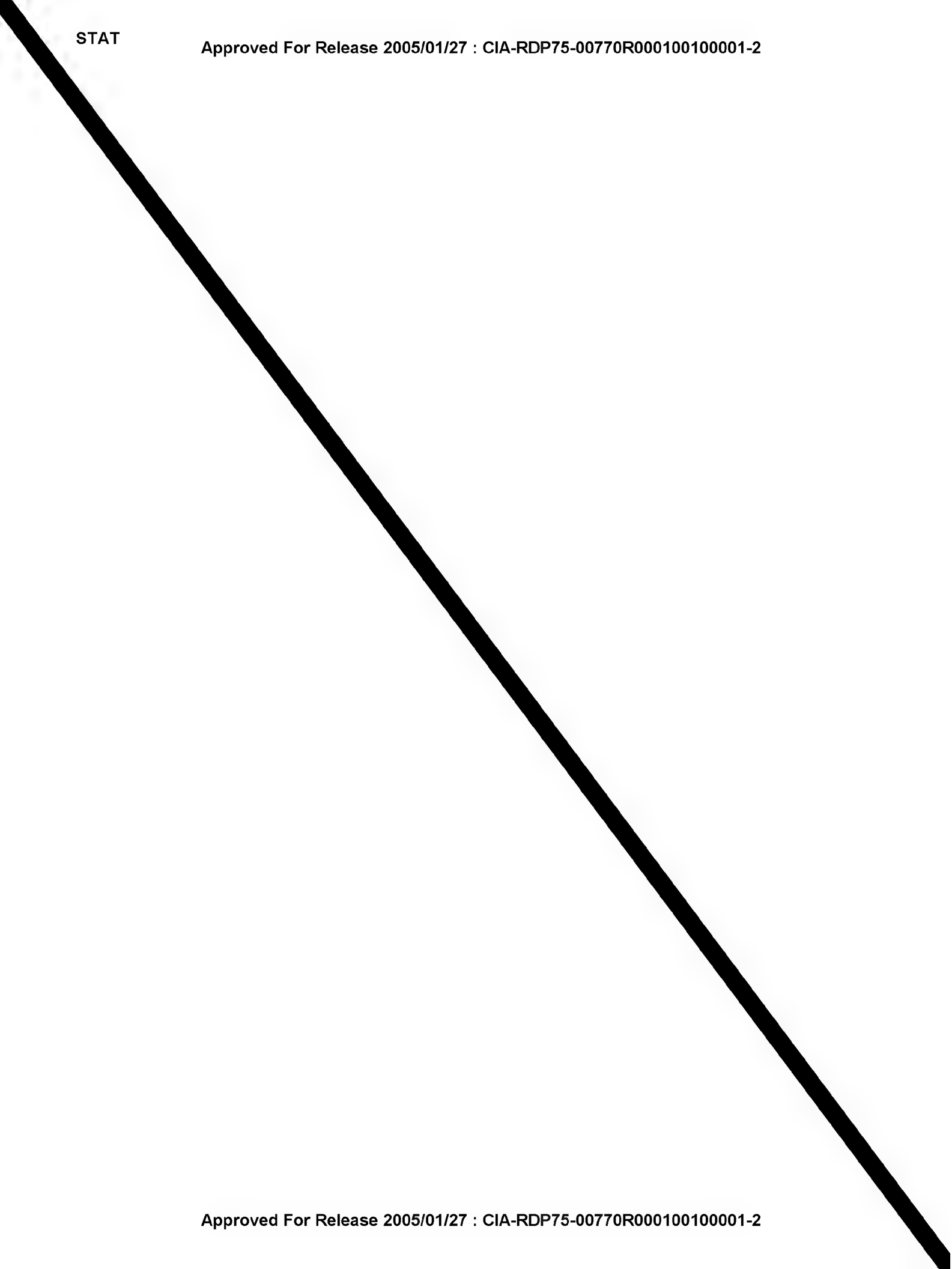
A copy of the foregoing SUPPLEMENTAL MEMORANDUM OF THE DEFENDANT IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT was hand delivered this 28th day of April 1966, to Ernest C. Raskauskas, Esquire, 910-17th Street, N. W., Washington, D. C., and Robert J. Stanford, Esquire, 1730 M Street, N. W., Washington, D. C., Attorneys for Plaintiff.

PAUL R. CONNOLLY

/s/

Paul R. Connolly

HOGAN & HARTSON
815 CONNECTICUT AVENUE
WASHINGTON, D. C. 20006



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE,	)	
	)	
Plaintiff,	)	
	)	
v	)	Civil Action No. 15952
	)	
	)	
JURI RAUS,	)	
	)	
Defendant.	)	
	)	

CLAIM OF PRIVILEGE BY THE
CENTRAL INTELLIGENCE AGENCY

The plaintiff has filed suit against the defendant for slander in connection with statements made by the defendant on occasions specified in paragraphs five, six and seven of the Complaint. As is shown by affidavits previously filed in this case by the Deputy Director of Central Intelligence, the defendant on those occasions was acting as an employee of the Central Intelligence Agency and made the statements in question pursuant to instructions from this Agency.

The plaintiff has requested taking testimony from the defendant, and interrogation in that regard of the defendant is scheduled in this Court on April 28, 1966.

The information respecting the employment by this Agency of Juri Raus previously furnished to the Court was released by the Agency in light of all the circumstances then existing. However, after a personal review and consideration of the facts concerning this Agency's employment of Juri Raus, I have determined that, when he appears in Court on April 28, 1966 for the purpose of giving testimony in this case, he must respectfully decline to answer questions which would elicit information

that relates to intelligence sources and methods and which I have prohibited from disclosure pursuant to the provisions of 50 U.S.C. 403g.

The United States, through its attorney, has objected and still objects to the disclosure of any information relating to Mr. Raus' employment by this Agency that Mr. Raus has been instructed not to disclose. Disclosure of such information would be contrary to the interests of the United States in protecting the security of its foreign intelligence activities.

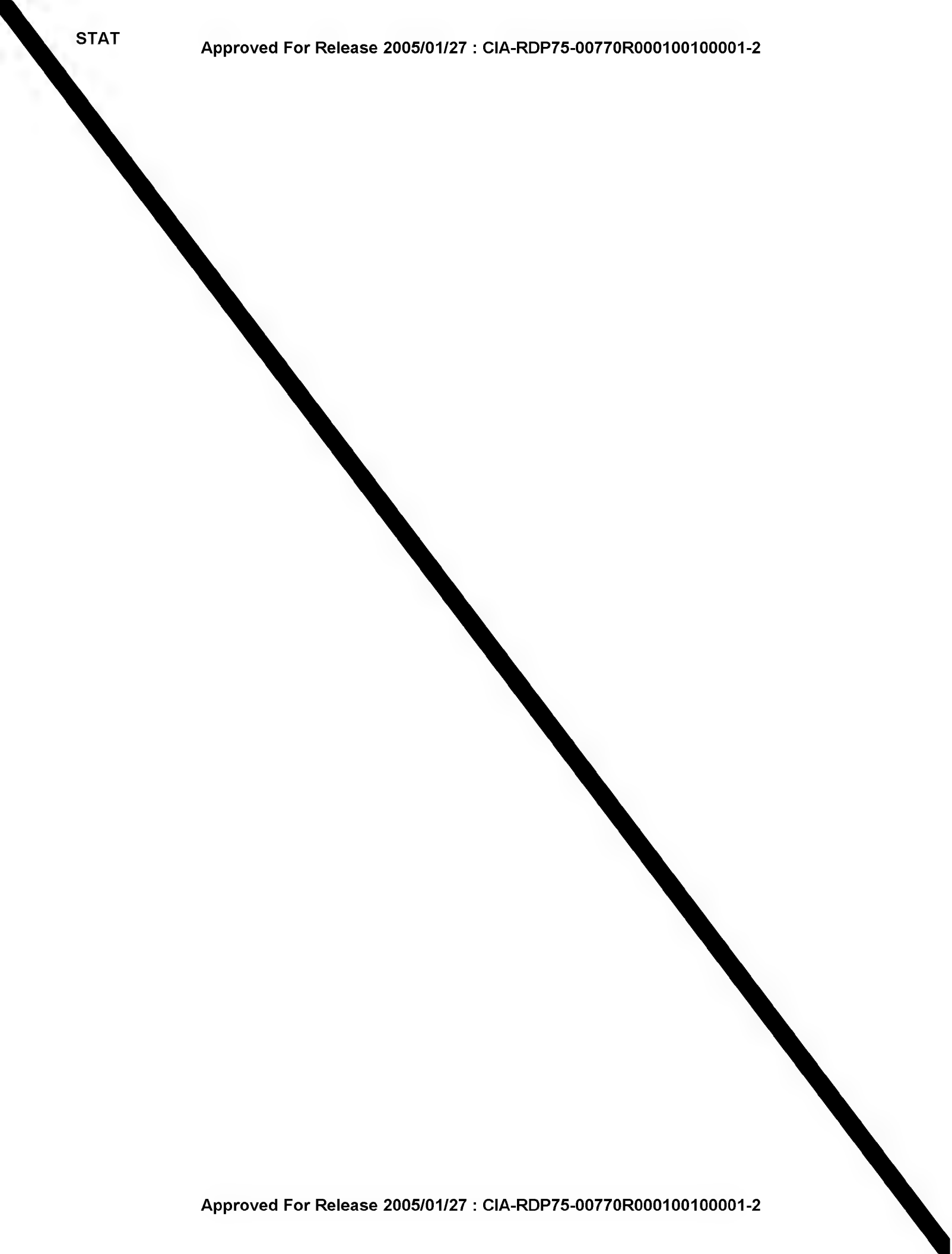
I am instructing Mr. Lawrence R. Houston, General Counsel of the Central Intelligence Agency, to appear personally in Court on behalf of the Agency on April 28, 1966 to assist in protecting information relating to intelligence sources and methods. Mr. Houston, will, of course, be accompanied at the hearing by attorneys for the United States who will assert the Government's claim of privilege with respect to the matters referred to above.

For the reasons stated above and for the purpose of effectuating the duties imposed on the Central Intelligence Agency by Section 403(d) of Title 50, United States Code, I consider that the compulsory disclosure of further information relating to intelligence sources and methods would be contrary to the security interests of the United States. Accordingly, pursuant to the

authority vested in me as Director of Central Intelligence, I formally assert the privileged status of such information and must respectfully decline to permit its disclosure.

April 27, 1966

W. F. RABORN



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FORD, SKEENS & RASKAUSKAS
ATTORNEYS AND COUNSELLORS AT LAW
910 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20006

PHONE 296-4272

DISTRICT OF COLUMBIA BAR
CHARLES N. FORD
EDWARD J. SKEENS
ERNEST C. RASKAUSKAS
MARYLAND BAR
EDWARD J. SKEENS
ERNEST C. RASKAUSKAS
VIRGINIA BAR
CHARLES N. FORD
EDWARD J. SKEENS

April 26, 1966

Office of the Clerk
United States District Court
Post Office Building
Baltimore, Maryland 21202

Attention: Mr. Wilfred W. Butschky

Re: Eerik Heine v. Juri Raus
No. 15952, Civil Docket

Dear Sir:

Kindly file on behalf of plaintiff the enclosed Supplemental Memorandum of Points and Authorities In Opposition to Defendant's Motion for Summary Judgment.

Yours very truly,

Ernest C. Raskauskas

ECR/fhr
Enclosures/mentioned
cc: Paul R. Connolly, Esquire
E. Barrett Prettyman, Jr., Esquire
Robert J. Stanford, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE	:	
Plaintiff	:	
vs.	:	Civil Action No. 15952
JURI RAUS	:	
Defendant	:	

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff by and through his counsel of record, Ernest C. Raskauskas and Robert J. Stanford, and respectfully moves this Court to enter an Order forthwith denying Defendant's Motion for Summary Judgment on the ground that there remain material facts which are actually and in good faith controverted, and upon the further ground that the first, second and third Affidavits filed by Richard Helms, Deputy Director of Central Intelligence, in support of Defendant's Motion for Summary Judgment, do not meet the testimonial requirements of Rule 56(e), and for reasons in support of this Motion plaintiff urges as follows:

1. The Memorandum and Points and Authorities filed by plaintiff herein on February 23, 1966, in opposition to Defendant's Motion for Summary Judgment is incorporated herein by reference and reurged upon the Court.

2. The first, second and third Affidavits of Richard Helms, Deputy Director of Central Intelligence, filed in support of Defendant's Motion for Summary Judgment, do not meet the testimonial requirements of affidavits under Rule 56(e), and said Affidavits are suppositious, conclusory, and said Affidavits usurp the function of the Court and jury and resolve the ultimate fact as to whether or not defendant was acting within the course and scope of his employment as a Government official when he slandered the plaintiff. Moreover, in the second Affidavit

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910-17TH STREET, N. W.
WASHINGTON, D. C. 20006
296-4272

executed by Richard Helms on April 1, 1966, he directs defendant to make no further disclosures concerning his employment by the Agency or relating to this case, and he reaches the judgment on behalf of the Agency that it would be contrary to the security interest of the United States for any further information pertaining to the use and employment of the defendant by the Agency in connection with the plaintiff to be disclosed. Accordingly, the Affidavits of Richard Helms cannot be considered since neither he nor the Affidavits are susceptible of cross-examination or any discovery whatsoever, by his own statement in the second Affidavit, and therefore said Affidavits must be stricken under the rule enunciated in Banco de Espana v. Federal Reserve Bank of New York (CCA 2d, 1940) 114 F2d 438, 445.

3. In his Motion for Summary Judgment, defendant has the burden of conclusively showing that there are no triable issues of fact, and under the authority of the United States v. Diebold (1962) 369 US 654, 655 82 S Ct 993, 8 L ed 2d 176, the Court is under a duty to give defendant's papers the most careful scrutiny and to indulgently regard those filed by the plaintiff. In the cited case, the Supreme Court held that "on summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion."

4. Plaintiff contends that the defense of "official immunity" like any other defense, must not only be pleaded but also must be proven. Under Barr v. Matteo, 360 US 564, 3 L ed 2d 1434, 79 S Ct 1335, certain, at least general, standards have been established as qualifications for this defense.

a) Status as Federal Officer. Defendant must establish that he was acting as a federal officer. It must be remembered that in Barr, the defendant was the Acting Director of the Office of Rent Stabilization. In the instant case, from the pleadings and

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affidavits filed on behalf of defendant, there is more evidence from him that he was a "casual contact," a "contract worker" or an "informer" for the C.I.A., rather than an officer of said Agency. In his memorandum filed on January 18, 1965, he asserts that "He possesses no financial resources other than his job." In his affidavit filed the same day, he states under oath that his exclusive income is as an employee of the Bureau of Public Roads of the Department of Commerce in Washington, D.C., at an annual gross salary of $10,605, and as a Captain in the United States Army Reserve with pay of approximately $1,000 per year. Furthermore, in the second affidavit filed by Mr. Helms on April 1, 1966, he states that the C.I.A. has employed Raus "from time to time--concurrently with his duties on behalf of the Bureau of Public Roads--to carry out specific assignments on behalf of the Agency." Therefore, testing the status of Raus under the very papers which he has filed, there is a material and substantial question presented as to his status as a federal officer. The Court is requested to take judicial notice of the fact that numerous governmental agencies use paid and unpaid informers, such as those used by Internal Revenue Service, Customs, in narcotics prosecutions, by the F.B.I., in deportation proceedings and the like, none of which individuals are dignified or characterized as "Federal Officers or Employees" by virtue of their employment with certain Federal agencies. In addition, the Court is requested to take judicial notice of the fact that many Federal agencies have contract workers for such varied functions as custodial and cleaning contracts to the making of surveys and special studies. None of these individuals are classified as Federal officers or Employees. In conclusion on this point, plaintiff contends that the available evidence on the status of the defendant as a C.I.A. employee preponderates against him for such a finding, and that further discovery by deposition scheduled of the defendant, will

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conclusively show that he was not an employee within Barr v. Mateo.

b) Scope of employment and statutory authority. Assuming for purposes of argument that defendant was a federal employee with the C.I.A., and assuming further that he was instructed to slander the plaintiff, nevertheless, defendant's action can be made the basis of a suit against him, if such action is beyond the statutory authority of the Agency, even though within the scope of defendant's authority. And further, defendant's actions, if otherwise justified must not be exercised in a manner that is constitutionally void. Dugan v. Rank 83 S Ct 999, 372 U.S. 609, 10 L Ed 2d 15.

In this case, defendant Raus stated on each of the three occasions complained of, that he was uttering the slanderous remarks on the basis of information obtained by him from the F.B.I., as evidenced by the affidavit of August Kuklane, heretofore filed on February 23, 1966. By what statutory authority does the defendant or the C.I.A. attribute the statements of the defendant to the F.B.I. They can -- by none. Shortly after the first public accusation by Raus against Heine on November 9, 1963, when Raus called Heine a KGB agent and stated that the F.B.I. was the source of the information, Heine's Canadian barrister wrote to the F.B.I. and received a copy of the letter attached hereto as Exhibit "A," over the signature of J. Edgar Hoover, and dated December 18, 1963, assuring Heine's barrister that the "Bureau has not released any information which could be the basis for the alleged charges against him." Hoover's letter then repudiates Raus' statement that the F.B.I. was the source of the allegations, and the position of the F.B.I. is clearly stated in a further letter which Raus circulated in the Estonian community after April 6, 1964, wherein a copy of a letter from J. Edgar Hoover to Raus of the same date, attached hereto as Exhibit "B," and the authenticity of which has not been established by plaintiff, the Director of the F.B.I. stated the information contained in the files of the F.B.I. "is

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available for official use only." Apparently this was not the only correspondence between the defendant and the F.B.I., since on May 10, 1963 (the month during which Raus signed the secrecy agreement with the C.I.A.) the defendant received a letter and circulated copies of the same in the Estonian community, from the Director of the F.B.I., an unauthenticated copy of which is attached hereto as Exhibit "C."

Accordingly, it is obvious that defendant was slandering a hero of the Estonian community, the plaintiff, and his only hope of success was to trade on and use the high, long-established and impeccable reputation of the F.B.I. If Raus was a C.I.A. agent, why was it necessary for him to write letters of inquiry to the F.B.I. in April of 1964? From whence the statutory authority of the defendant or the C.I.A. to slander in the name of the F.B.I.? The defendant has remained silent to this question. Furthermore, under Title 50 U.S.C. A. §403(d)(3), it is specifically "Provided, That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions;" and the Federal Civil Defense Act of 1950 limits "investigations of espionage, sabotage, or subversive acts" exclusively to the F.B.I. 50 U.S.C. A.2263. Therefore, in conclusion on this point, plaintiff contends that the available evidence on the statutory authority of the Agency and the scope of defendant's legitimate authority preponderates against the defendant as being a governmental official or employee acting within the scope of his statutory authority, and that further discovery by deposition scheduled of the defendant, will conclusively show that he did not act within the outer perimeter of any statute as required by Barr v. Matteo.

5. In the third Affidavit filed by Richard Helms, Deputy Director of Central Intelligence, on April 22, 1966, he carefully states that "the defendant, in a series of conferences, was

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furnished information by the Central Intelligence Agency to the effect that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent." (emphasis supplied) This Affidavit does not state that plaintiff is or was a KGB agent, but states only that defendant was furnished information "to the effect" that Heine was a KGB agent. Rumors and suspicions would constitute information "to the effect." Thereafter, the Affidavit states that "defendant was instructed to warn members of Estonian emigre groups that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent." Therefore, these allegations were based on rumors and suspicions, as borne out by a copy of the attached letter from the defendant to one Meeme Malgi, a copy of which in the Estonian original is attached hereto as Exhibit "D" together with the English translation and the letter of transmittal from said Malgi to counsel for the plaintiff.

The third Affidavit of Helms further details that the purpose of the instruction to defendant Raus was "to protect the integrity of the Agency's foreign intelligence sources existing within or developed through such group." However, on all of the occasions complained of, the statements were made to groups and individuals within the continental United States, and therefore within the exclusive jurisdiction of the Federal Bureau of Investigation. And if Heine, who traveled throughout the United States in 1963 and 1964 (Heine deposition pp. 29-31) was and is a KGB agent, he could have been stopped at the Canadian border and not admitted as an alien or Canadian citizen, or he could have been arrested once he crossed into the United States as aKGB agent, the very fact of which would rendered him in violation of multiple offenses under the U.S. Code. Why was not the F.B.I. requested to take him into custody by the C.I.A. The inference from the facts is irresistible -- that there was not enough evidence even for an indictment let alone a connection -- and at least an indictment

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would have given plaintiff an opportunity for vindication. Therefore, these slanders against plaintiff were part of a deliberate and calculated design to destroy without proof, and no agency has ever been given such powers by statute in the history of the United States, unless it is ruled herein that the C.I.A. has.

In addition, the third Affidavit of Richard Helms, as vague and as ambiguous, as the first two, also continues to make ultimate conclusions which invade the province of the Court.

All of the Affidavits assert enigmatically but imperiously the alleged purpose of the statements but no facts are given to support the conclusion. A reading of Helms' third Affidavit does not reveal whether the "statement of purpose" is the considered opinion of the person who instructed Raus to make the slanderous remarks; the gratuitous self-serving assessment of the affiant; or the exculpatory utterance of the defendant Raus.

The third Affidavit of Helms is further deficient in its statement in paragraph 2 that "the defendant was instructed to warn members of the Estonian emigre groups that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent." We are not told the position or the authority of the person who instructed Raus or, in fact, that such instruction came from the Central Intelligence Agency. This gross omission must be considered in the light of the fact that the Affidavit filed April 25, 1966, is the third sworn statement of Richard Helms. We must infer from this fact alone that it was drawn with Machiavellian cleverness, massive cunning, and calculated expediency.

It must be concluded, therefore, that if the Central Intelligence Agency could have said that it instructed Juri Raus to utter the slanderous remarks set out in paragraphs 5, 6, and 7 of the plaintiff's complaint, it would have specifically so stated. The latest Affidavit goes down for the third time, drowning in its own

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WASHINGTON, D. C. 20006
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duplicity, utterly failing to set forth essential facts upon which the defendant's Motion can be considered.

6. In the Second Defense of both the original and amended Answers filed by the defendant, he "admits having spoken to one August Kuklane...on an occasion earlier than those specified in paragraphs 6 and 7 of the complaint.... However, he denies making the statements attributed to him as specified in those paragraphs." Plaintiff contends that this denial as contained in the Second Defense constitutes a justiciable issue and is certainly not in accord with the Affidavits filed by Richard Helms, who states that defendant was authorized to make the statements which defendant has denied making.

7. On the question of waiver of the defense of absolute immunity, heretofore urged by plaintiff in his pleadings filed on February 23, 1966, and March 31, 1966, plaintiff respectfully reurges upon the Court the points raised in said pleadings, and further requests the Court, in the light of the three Affidavits filed by the C.I.A. through Richard Helms, to consider what possible prejudice to national security, what excuse or mitigating circumstance other than the intrinsic and inordinate worship of secrecy justified a delay of more than one year in asserting this defense, which is still shrouded in secrecy and unproven. While the Agency may be the arbiter of whether it will assert a given defense through a defendant, it is within the province of the Court to determine whether said defense was timely filed. As yet, there has been no justification for the delay, except the claimed lack of permission, which itself has not been explained or justified. The exclusive and sole basis for delay asserted by defendant is through the testimony of one of his defense counsel (pp. 66-71, Tr. Hearing of March 11, 1966) that in a discussion with an attorney at the C.I.A., defendant's counsel were not given

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ATTORNEYS AT LAW
810-17TH STREET, N. W.
WASHINGTON, D. C. 20006
296-4272

permission to raise the defense of absolute immunity. No reason or justification other than secrecy was asserted. Yet, in the same hearing the same defense counsel admitted that there had been no change in the secrecy law respecting the Central Intelligence, but now the defendant is able to assert this defense and attempt to buttress it with three successive Affidavits by the Deputy Director of the Agency. The Court and the plaintiff are entitled to a more substantial showing.

8. Secrecy is not a defense. It can neither be used as a sword against the plaintiff nor as a shield by the defendant. Under U.S. v. Reynolds 345 US 1, 97 L ed 727, 73 S Ct 528, 32 ALR 2d 382, the claim of privilege against revealing secrets must be formally invoked by the government and not by the defendant as herein in his Motion for a Protective Order, and the claim must be formally lodged by the head of the Agency after his actual personal consideration. Thereupon, it is for the Court to determine whether the circumstances are appropriate for the claim of privilege, but without requiring disclosure of the very matter sought to be protected. Therein lies the difficulty and Reynolds analogizes the determination by the Court with the one invoking the privilege against self-incrimination. However, as in self-incrimination the defendant can either say everything or nothing, about those matters where secrecy is pleaded. The three successive Affidavits of Mr. Helms, each giving a little more, give substance to the rationale of Reynolds where Chief Justice Vinson said "Judicial control over evidence in a case cannot be abdicated to the caprice of executive officers."

In conclusion, while the government upon sufficient showing may be able to claim and sustain a privilege with respect to secrecy, and the Court may limit or preclude plaintiff's discovery on that account, none of this is of any benefit to defendant,

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ATTORNEYS AT LAW
910-17TH STREET, N. W.
WASHINGTON, D. C. 20006
296-4272

because the plaintiff has made his allegations and is ready to prove them, while the defendant has asserted nine separate defenses, none of which he offers to prove, even the defense of "official immunity" which would spare him the onus of trying this case on the merits.

Respectfully submitted,

Ernest C. Raskauskas
1418 Ray Road
Hyattsville, Maryland
202 296-4272

Robert J. Stanford
10401 Grosvenor Place, Suite 1314
Rockville, Maryland
202 296-8870

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Copies of the foregoing Supplemental Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and annexed exhibits were mailed, postage prepaid, this 26th day of April, 1966, to Paul R. Connolly, Esquire, Hogan & Hartson, 815 Connecticut Avenue, N.W., Washington, D.C. 20006 and E. Barrett Prettyman, Jr., Esquire, Hogan & Hartson, 815 Connecticut Avenue, N.W., Washington, D.C. 20006, attorneys for defendant.

Ernest C. Raskauskas

Robert J. Stanford

FORD, SKEENS & RASKAUSKAS
ATTORNEYS AT LAW
910-17TH STREET, N. W.
WASHINGTON, D. C. 20006
296-4272

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RH —
TJ —
RB —
TG —

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE

vs.

JURI RAUS

Civil No. 15962

TRANSCRIPT OF PROCEEDINGS

April 14, 1966

FRANCIS T. OWENS
Official Reporter
514 Post Office Building
BALTIMORE 2, MARYLAND
SAratoga 7-7126

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

- - -

EERIK HEINE :
:
vs. : Civil No. 15952
:
JURI RAUS :
:
- - - - - - - - - - - - - :

Baltimore, Maryland
Thursday, April 14, 1966

The above-entitled matter came on for hearing before His Honor, Roszel C. Thomsen, Chief Judge, at ten o'clock a.m.

APPEARANCES

For the Plaintiff:

MR. ERNEST C. RASKAUSKAS
MR. ROBERT J. STANFORD

For the Defendant:

MR. E. BARRETT PRETTYMAN, JR.

Also present representing the United States Government, Mr. Thomas J. Kenney, United States Attorney; Mr. Kevin T. Maroney, Attorney, Department of Justice.

- - -

PROCEEDINGS

THE COURT: Mr. Prettyman, suppose you tell me what are the matters that we have here for decision today before I hear from the other side.

MR. PRETTYMAN: We have still pending, Your Honor, our motion for summary judgment. That, of course, has been countered by Mr. Raskauskas' motion to strike our amended answer, which is also before you.

We filed a motion to file an amended answer. Your Honor granted it, and thay have now moved to strike it, and you said that you would consider that today.

THE COURT: All right.

MR. PRETTYMAN: Then finally we would like to take up today, in view of the shortness of time before the date set for Mr. Raskauskas deposition, our motion for a protective order in regard to that deposition.

Now, Your Honor, before introducing the representatives from the United States who are here, I might say an introductory word in view of your comments at the last hearing in regard to the assertions made about private counsel for the defendant.

This is an unusual case, of course. In the normal case where the defendant is an employee of the United States he requests the United States to represent him,

and Government counsel speak for him from the outset. Here the defendant could not do that because he was not even allowed to show his Government connections at the outset of the case, as indicated by my testimony at the last hearing.

Consequently he had no choice but to employ outside private counsel. We still represent the defendant, of course; but today one of the reasons for requesting this hearing was so that we could have a statement on behalf of the United States as to their interest in the matter and the position of the United States.

In the courtroom is Mr. Kenney, the United States Attorney, whom you know, and Mr. Kevin Maroney, who is chief of the Appeals Section of the Internal Security Division of the Department of Justice, and with your permission, Your Honor, I would like him to make a statement.

THE COURT: Is Mr. Raus here today?

MR. PRETTYMAN: No, sir, he is not.

THE COURT: Well, maybe we ought to hear from the other side first. Well, I guess the other side would like to hear, the plaintiff would like to hear the whole thing that the defense has to say before answering.

So Mr. Kenney, do you want to make a statement of the Government's position?

MR. KENNEY: Yes, Your Honor.

I would like to represent to the Court that

Mr. Maroney and I appear here today at the personal and expressed direction of the Attorney General, and we are authorized to represent to the Court on behalf of the United States that we believe that the facts that are set forth in the affidavit are correct and true.

The Attorney General does not desire to make it affirmatively appear one way or the other that he or the Department of Justice necessarily approves of what was done here, but we believe that this man was an employee, and that he made the statements that are set forth in the affidavit that are in issue here in the furtherance of his duties.

THE COURT: You say he made the--

MR. KENNEY: The defendant.

THE COURT: You mean Mr. Raus?

MR. KENNEY: Yes.

THE COURT: Made the statements referred to in Mr. Helms' affidavit?

MR. KENNEY: That is correct, Your Honor, as part of his duties; and further that if he had requested government counsel initially, if it had not been the unique kind of case that it is, that in all probability the government counsel would be asserting here the defense of absolute privilege as his private counsel are.

Mr. Maroney, is that a fair statement?

MR. MARONEY: Yes, sir.

THE COURT: Is Mr. Maroney--how do you spell it?

MR. MARONEY: M-a-r-o-n-e-y.

THE COURT: And you are with the Department of Justice?

MR. MARONEY: In the Department of Justice.

THE COURT: What is your full name, sir?

MR. MARONEY: Kevin T.

MR. PRETTYMAN: Your Honor, before the plaintiff speaks perhaps it might be helpful if I summarized the situation as I now see it, so he would have something quite clearly to address himself to.

THE COURT: Well, let me just ask them one thing, whether they agree that the points before the Court or the matters to be decided are the defendant's motion for summary judgment, the plaintiff's motion to strike the amended answer, and the defendant's motion for a protective order re the deposition?

I guess they would come up in the inverse order because the motion for the summary judgment would be the last thing to be heard, and the Court is not going to grant a summary judgment until all preliminary matters have been cleaned up, certainly, and if they are not cleaned up, well, then, summary judgment could not be entered.

Is that your understanding of the situation?

MR. RASKAUSKAS: Yes, Your Honor.

We expected in accordance with the tenor of your letter concerning the hearing today that we would first consider the motion to strike the order to amend the answer.

THE COURT: Yes, that is going to be done first.

MR. RASKAUSKAS: And secondly, we would consider the summary judgment motion and ascertain whether the Court is going to deny the motion without prejudice, as we discussed it in the last hearing, and require the defendant to file a new motion, or just how that summary motion was to be treated.

Now, we did not expect today that we would argue the merits of the summary judgment motion.

Our understanding was that we would ascertain the procedural posture of this motion, and finally, although we just received the motion for a protective order by the defendant, we are prepared to have a hearing on that motion respecting the discovery today.

THE COURT: All right.

MR. RASKAUSKAS: And I might add one more thing, Your Honor, that I think we have to object to the statements made and request the Court not to consider any statements made by these distinguished gentlemen from the

Department of Justice.

I think that if they are going to involve themselves in this case they should enter an appearance formally and participate as counsel. Now, I really cannot understand how these gentlemen are cast today.

THE COURT: Well, I think their cast today was that I was unwilling at the last hearing to allow a defendant in the case, who says he is a government employee, and who evidently was--nobody disputes that he was employed by the Government in some capacity--to claim this privilege in view of what had been previously entered in it because I felt that it was important to know the position the Government took in the matter.

I mean, a man can always claim--if anybody can claim that privilege you have got to have a hearing on it, and you have got to do something about it.

If the Government claims it it may become just absolute, and that is what I think your problem is.

Now, if the Government, Mr. Kenney is appearing here and making a statement in court for the Government, you can't sue, you say they ought to appear as attorney, and I am not quite sure in what capacity.

MR. RASKAUSKAS: Well, Your Honor, the fact of the matter is that as I respectfully view this situation is

that Mr. Kenney has now made a statement and has submitted information to the Court, no appearance with the Court, and he may withdraw now, and we have lost any opportunity we have to inquire into this matter, and all he has done is made a statement.

THE COURT: No, I am willing to allow you to inquire as far as you may properly do. I have not made any determination of what may be done.

What I wanted to do was to have the United States appear, whether as amicus curiae or on behalf or along, associating themselves with this claim and get a statement of the facts from the United States.

Now, the United States can, in a sense it is intervening, and maybe Mr. Kenney and Mr. Maroney would clarify what their position is.

I have not made any decision as to what their position is, and before the Court considers what has been done I want Mr. Kenney and Mr. Maroney to tell me exactly what position they are taking in the case.

Now, they can be simply coming--there are various possibilities. They may be intervening on behalf of the United States to assert this privilege, which is perhaps the way it has been done. They may come in as a kind of witness brought in by the defendant in support of his amended answer or in support of his right to file the

amended answer, and in that event the Court pretty much insisted that he go that far, and that the Court wanted to know the position of the United States on this amended answer so that you would be protected against--not that I intimate there was any--against a fraudulent claim of privilege.

Now, as I say, anybody can say, "I claim the privilege," and if that stops the case we have a bad situation.

If a man is claiming absolute privilege, the Court told Mr. Prettyman that I was not willing to accept just an affidavit without a certification, but he just produces an affidavit which he says is a signature of a man whom he said if I read the Congressional Record or the Washington Post or something else I would know he was a very important gentleman, and I said I was not willing to take that sort of evidence.

But when the United States Attorney and the Department of Justice come in and bring a certificate which they say is signed by the head of the agency or somebody who is a delegate of the head of the agency, the Court then is able to accept or is justified in accepting statements which I would not otherwise have been justified in accepting.

So I do not know whether the Government is here as a representative of the defendant, as intervening--well, I

do not mean representing, but at the request of the attorney for the defendant and as part of the defense or whether they are intervening in the case to assert this position, or whether they are coming in as amicus curiae to the extent that the Court has invited them in to make clear whether there is a proper basis for this contention.

Now, I will be glad to hear from them.

MR. RASKAUSKAS: Yes. Of course, we are very glad to see these gentlemen, but we were concerned about as far as clarification is concerned as to how they are in this matter.

THE COURT: Yes.

MR. RASKAUSKAS: In this case.

THE COURT: I think Mr. Kenney ought to clarify that as soon as he and Mr. Maroney have a discussion on it.

MR. KENNEY: If Your Honor please, it was not our intention to intervene in this case. We appeared simply as amicus to assure the Court and to represent to the Court that the United States of America tells the Court that this man was an employee and that the facts set forth in the affidavit are true, and that if we were representing him we would be following the same proceedure.

THE COURT: Well, what it is, what it amounts to is that the Government at the invitation of the

Court comes in and states this position, and it is now affirmatively stating that they have authorized and in fact are directing the defendant to take this position, that they are authorizing him to claim privilege and directing him not to go beyond that.

Isn't that what it comes to?

MR. KENNEY: That is correct, Your Honor. The only qualification I make to it is this: That the Attorney General approves the plea of privilege here and thinks it is well-pleaded. Let us put it that way.

THE COURT: Well, that is amicus curiae when you tell me that. That is what that is.

MR. KENNEY: Well, that is ultimately for the Court to decide.

THE COURT: That is right.

MR. KENNEY: I am only expressing our opinions about the matter.

THE COURT: That is right.

MR. KENNEY: But the Attorney General simply wants it made clear that although he is approving the legal aspects of this thing he is expressing no opinion one way or the other as to whether he approves or disapproves the conduct of the defendant. That is something between the CIA and--

THE COURT: And the defendant, yes.

MR. KENNEY: And the defendant.

THE COURT: Yes.

MR. PRETTYMAN: Now, I think it might be helpful if I can summarize briefly where we are at least in our view now; and secondly, to address myself to their motion.

The defendant personally raises and asserts the defense of absolute immunity, and that absolute immunity comes about for two reasons: First of all, he was a government employee at the time that the statements were made; and secondly, he made the statements in the course and scope of his employment.

The Government has taken the position that the facts as to employment and scope of employment are true, and it in turn raises a privilege itself, a kind of ancillary privilege as to the release of further information other than that which has already been divulged in the various pleadings.

Now, our position at this stage is that the Court has before it all of the facts and undisputed facts that it needs on a motion for summary judgment.

Undisputed on this record is proof of employment and the proof that the man acted within the scope of his duties, and under those circumstances, under

the cases which we have already cited to Your Honor, and I particularly mentioned the Lyons case.

THE COURT: Which one?

MR. PRETTYMAN: The Howard v. Lyons, Your Honor, Howard v. Lyons. That is 360 U.S. 593.

You may recall that is the case where the Navy captain, the Commander of the Boston Navy Yard wrote a derogatory letter and sent it not only within the Navy but also to the Massachusetts Delegation and then to the newspapers, and his superior merely filed an affidavit saying that the man was acting within the scope of his duties, and that was accepted and summary judgment was granted.

Now, it is our position that that is precisely the situation that we have here and that summary judgment is clearly called for.

Addressing myself then to the motion which the plaintiff has filed to strike out the amended answer, Your Honor has indicated at the last hearing that he would look favorably upon the filing of a motion to file an amended answer, and we filed that motion, and Your Honor granted it, and now they have moved to strike.

First they claim that there was undue delay in the filing of our motion. Of course, we never conceded

that we did not adequately plead the first time; but assuming that we did not, the delay clearly was not of the defendant's own doing.

The reason for the delay clearly appears from the pleadings. The interest of the United States was at stake in this case.

The gentlemen in the Government who have the responsibilities for deciding these matters apparently had a balancing of interest which they had to consider. They apparently made the decision that because of the security interests of the United States this man's affiliation with the agency and the facts behind what has happened simply could not be revealed at that time.

That was not of the defendant's doing; he had no choice; he was bound by law; he was bound by statute; he was bound by a secrecy agreement; and he would have been subject to criminal prosecution if he had revealed unilaterally at that time his government connection and the facts as he knew them.

Clearly the so-called undue delay is explained by this record.

We are accused of bad faith. It is said that we misled the Court because of a claim of poverty. The defendant's claim of poverty was absolutely true. There has been no showing whatever as to who paid for

whatever investigation might have transpired. There has been no showing that this man has funds which he did not reveal to the Court. And I assert to you that there is nothing in the record and nothing in fact that contradicts his claim of poverty.

Parenthetically there is a statement that the plaintiff's wife was harassed, and I can assure you absolutely that she was in no way harassed during the course of a normal investigation.

It is asserted in this pleading that--

THE COURT: Whom did you say was harassed? I am not quite clear about that.

MR. PRETTYMAN: There is a claim, Your Honor, that during the course of investigation that the plaintiff's wife, while the plaintiff was here in Washington having his deposition taken, was harassed.

The truth of the matter was that the investigators went to see her to see if she had anything to say about the case. She was in no way harassed.

THE COURT: Well, who was the investigator?

MR. PRETTYMAN: There were, I believe, two gentlemen, Your Honor. One was a Mr. Lavinia, and I am sorry to say I do not recall the other gentleman's name.

THE COURT: Were they investigating, you say they were government employees?

MR. PRETTYMAN: No, sir.

THE COURT: Were they independent contractors?

MR. PRETTYMAN: Yes, sir.

Now, a statement is made in here that the defendant attempted to buy off the plaintiff. In my eleven years of practice I have never encountered an assertion that the normal attempts at negotiating settlements between counsel has been characterized as an attempt to buy off any party.

There were informal discussions repeatedly between counsel in our office, in their office, over the telephone, about the possibilities of settling this case. We having the interest of our client at stake obviously were interested in a settlement if it could be worked out so that our man would not have to reveal things which we felt might be against the interest of the United States.

These discussions were informal. We thought that they were carried on in a friendly manner. There was the usual joking and joshing that goes on in these discussions; and to characterize what happened as an attempt to buy off the plaintiff, I think, is outrageous. It is comparable to saying that the plaintiff attempted to sell out his client by negotiating for a settlement or that he attempted to buy off the United States by dealing with us in negotiations toward settlement.

I categorically deny the statement as to why the negotiations broke down. The negotiations broke down because we could not sanction any settlement that gave this man any excuse, even an implied one, to claim that he had been given some kind of approval.

I categorically deny that I intimidated counsel on the other side, as is stated in this motion.

Counsel refers to the fact that--

THE COURT: Well, I will hear from them as to what their position is as to whether they controvert your statements as to whether they think it is material. You say that it is immaterial, and secondly, if material, is untrue.

MR. PRETTYMAN: And outrageously asserted, I certainly do.

Now, they refer to the dilatory motives here. They say that the defendant made an election as to not to plead this absolute immunity.

He did not have an election; he did not have a choice; he was bound by law to silence, and the choice was made by those officials in Government to whom the responsibility is given for making such decision.

Now, in the balancing of interest that the officials had to consider, apparently at some point they decided, I would guess, because of the lengthy interrogatories

filed, but I do not know, that they made the judgmental decision that the balancing of interest had shifted and that it was now incumbent upon them to make at least a sufficient revelation of the facts so that absolute immunity could be pleaded, which is precisely what they did.

They say that there was undue prejudice to the plaintiff. The only prejudice which they referred to is an inconvenience in terms of the taking of his deposition.

This is not undue prejudice; this is the type of inconvenience which is normal to the discovery process in every lawsuit.

The argument that there is no privilege where the defendant had a choice of whether or not to slander someone, that argument, of course, would wipe out every governmental immunity suit because in every one the government employee presumably has a choice to make as to whether he will make a statement.

That is not the law. The law is that if the man makes the statement, whether he had a choice or not, if he makes the statement in the course of his employment and within the scope of his duties that he is thereupon absolutely privileged to make it.

Finally they say that the defense is simply no

longer available. There is a bare assertion in this pleading that the statements were not related to the defendant's duties but rather that they were made to destroy the plaintiff.

That is totally unsupported and is untrue; all the evidence here is directly to the contrary.

THE COURT: No.

MR. PRETTYMAN: As Mr. Helms' affidavit shows, the statements were made because this man was directed to make them. They were related to his duties.

THE COURT: Well, it now appears so.

MR. PRETTYMAN: Yes, sir, that is correct.

THE COURT: But from the papers which said he was merely an employee of the Bureau of Roads, it was not so apparent. That is one reason why I wanted to get into the record whether he was indeed acting under the directions of CIA.

MR. PRETTYMAN: I understand.

They say here in the same part that the Government immunity applies only where the plaintiff, and I am quoting them:

"Innocently and inadvertently made a statement."

Well, now, of course, the rule is otherwise. The statement can be deliberate; it can even be made with

malice, as the Garrison case shows.

THE COURT: Wait a minute. The Garrison case?

MR. PRETTYMAN: Pardon? I am sorry. I did not hear Your Honor.

THE COURT: The Garrison case. I do not carry these cases in my mind. I suppose they are somewhere in the papers.

MR. PRETTYMAN: Let me cite it for Your Honor.

THE COURT: They are in the papers somewhere, but I would like to be sure that I have it.

MR. PRETTYMAN: Garrison vs. Louisiana, 379 U.S. 64.

THE COURT: All right.

MR. PRETTYMAN: At page 74, the Court said:

> "That federal officers enjoy an absolute privilege for defamatory publication within the scope of official duty, regardless of the existence of malice in the sense of ill-will."

Now, there is no malice here. I want that made clear that I am not saying this man spoke with malice.

THE COURT: There is an allegation of malice, isn't there?

MR. PRETTYMAN: Pardon?

THE COURT: There is an allegation of malice,

MR. PRETTYMAN: As a matter of fact, I am not sure there is, Your Honor.

THE COURT: Isn't there?

MR. PRETTYMAN: I will have to check that to be sure.

THE COURT: Well, I thought you said he did it in order to, I thought you said that the contention was that it was not related to his duties but was made to destroy the plaintiff?

MR. PRETTYMAN: Well, contention in this current pleading, but I would have to look back at the complaint to make sure. I do not recall that the complaint alleged that, malice.

THE COURT: All right.

MR. PRETTYMAN: I will check that.

THE COURT: All right.

MR. PRETTYMAN: Well, in summary we dispute first, of course, all of this pleading, and most of it we feel is totally irrelevant. We think that the reason for the delay appears as clearly as it can under the circumstances from the affidavits that have been filed.

There has been no statement by the United States as to precisely why this delay occurred, but that is because it was within the administrative decision of the

people to make it.

THE COURT: I understand.

MR. PRETTYMAN: Of the people who have the security interest of the United States at heart.

Now, Your Honor, I just want to make one thing clear at the end. There has been a statement published in an Estonian newspaper in New York by friends of the plaintiff which indicates that somehow or other the defendant here is trying to cover up the facts or does not want the facts to come out, that he is in some fashion hoping that nothing develops, and so forth.

I want to make clear on behalf of this defendant that he is bound by law, by the secrecy agreement, and by his superiors not to speak. This is not a question of what he would want to reveal or what he would say if he were given the opportunity.

This defendant may want the facts to come out far more than the plaintiff knows; but he is bound by law, and he has no choice.

This is a legal matter that we are now discussing and that is as to whether or not he did have absolute privilege. Mr. Helms' affidavit directs this man to make no further statements other than those which have been made in the pleadings thus far.

On all of these grounds we respectfully request Your Honor to deny their motion and let your order stand.

THE COURT: To let the order stand. Now, do you want to argue the motion for the protective order at the same time, or shall we dispose of the other one first?

MR. PRETTYMAN: Well, I think we can do that in just a moment.

THE COURT: It seems that the two are closely tied together.

MR. PRETTYMAN: The motion, it seems to us, practically speaks for itself. The only question that the man, or the only information that the man could give in the deposition is precisely the facts which have been sworn to in the record, that he is directed by Mr. Helms and precluded by law from going further.

Now, if that is true, if Mr. Helms had authority to do what he did, and we believe that he did under the statute which he cites, then there simply cannot be a deposition unless it is to be a meaningless formality because the man just can't answer.

THE COURT: You mean he will claim privilege to all the questions except those which ask the same questions which have been stated by Mr. Helms?

MR. PRETTYMAN: Yes.

THE COURT: Is that what you mean?

MR. PRETTYMAN: Yes, it is, Your Honor, and further I want to say this, Your Honor, that that would apply even to the questions which may seem innocuous on their face. For example, let us assume that in the pleadings that Mr. Raus' home address does not appear, which it does, but let us assume that it did not, and the first question out of the box was, "State your home address."

It may be that for reasons which are totally unknown to us that the agency would not want Mr. Raus' home address stated. There may be things relating to his home address about which we know nothing and which for security reasons should not be stated.

Even the most innocuous questions on their face could not be answered if they have not already been answered because Mr. Helms has reserved to himself the question of whether they would affect the security interest. Therefore it seems obvious to us that a protective order is in order.

MR. RASKAUSKAS: May it please the Court, I will address myself to the motion to strike the order to amend the answer, and with the Court's permission respecting the argument on the summary judgment motion, associate counsel, Mr. Stanford, is prepared to speak to the Court on that aspect.

Now, I would reurge upon the Court without rearguing the points we have raised in support of our motion. I will not inflict upon the Court a repetition of these points.

I would like to add only one or two things in answer to what Mr. Prettyman has just stated and one new matter.

We have nowhere in this file a statement from the defendant that he was precluded from raising this defense at the outset. The tenuous basis for the position of the defendant in this case is the statement made by Mr. Prettyman when he testified that he and Mr. Connolly had a consultation with an attorney at the CIA. That is the only basis for justifying the delay; we have nothing from the defendant.

THE COURT: Well, when you say a "statement", Mr. Prettyman testified under oath, didn't he?

MR. RASKAUSKAS: He testified.

THE COURT: Subject to cross-examination.

MR. RASKAUSKAS: Yes, Your Honor, but he testified under oath that he had a conference with an attorney at the CIA on page 73 of the last hearing.

THE COURT: Have you got that? I think I read it the other day.

Yes.

MR. RASKAUSKAS: We have nowhere in this file that any official of the CIA forbade Raus to assert this defense at the outset. We have nowhere in this file that Raus ever asked any official permission to assert this defense.

Casting the testimony of Mr. Prettyman in its best light I would reiterate that we have an opinion of an attorney at the CIA that they could not plead this defense.

Now, that is taking it in the light most favorable to the defendant on this business of undue delay.

The affidavit most recently submitted by the Deputy Director of the CIA, I think, raises a new point. I think it raises the point which says that if the defendant had the defense the most he can do is plead it but he cannot prove it.

So for this reason and this reason alone I would say that it would be a useless gesture for the defendant to amend his complaint and plead that which he cannot prove.

THE COURT: You mean answer? He does not say he cannot prove it. He asserts the privilege, and under the law, as I understand the law, which he is authorized and justified in asserting it, he does not have to prove it. The case stops like that, and the Court must

stop immediately.

MR. RASKAUSKAS: We respectfully differ on one point with Your Honor. The defense of official immunity stops the case.

THE COURT: Yes.

MR. RASKAUSKAS: But this defense must be proved. The man first of all must prove his employment, and secondly, he must prove that his conduct comes within at least the outer perimeter of the scope of his employment.

This is a very difficult and complex problem in almost any case, and is found in the case upon which the defendant relies, Barr v. Matteo, a five to four Supreme Court decision, where the Justices wrestled with this problem, and some of the dissenters stated that that case gave no good case to case test, that it would have to be decided, each case on its own merits.

THE COURT: Yes.

MR. RASKAUSKAS: But the defendant must prove that his activities were within the outer perimeter of the scope of his employment.

THE COURT: Well, doesn't this affidavit show that?

MR. RASKAUSKAS: No, Your Honor.

Now, this is strictly a factual determination that must be made; and to say that a man is employed by the

CIA does not prove that his conduct was within the outer perimeter of the scope of his employment; nor for that matter does it prove that the agency had itself the authority to authorize this conduct.

Our position is and has been, first of all, that we cannot ascertain whether or not this man was authorized, with the facts we have now, to do what he did, and whether it was within the scope of his employment. That discovery had not been available to us, and we cannot inquire into it. We are forestalled from inquiring into that.

But we go beyond that and say that the agency itself under the U. S. Code has no authority and has shown no authority, and in reply to our opposition to the motion for summary judgment has never responded citing their authority for becoming involved in private associations in this country of authorizing a man to disseminate information.

THE COURT: You mean the affidavits have not shown that?

MR. RASKAUSKAS: No, they have not, Your Honor, nowhere in this record.

THE COURT: Well, he is not a party to the case, and it seems to me that whether the CIA acted wisely or unwisely, the authority, if you read this affidavit of Mr. Helms that has just been filed by the Government, the Government has come in at the request of the Court and

presented this, and it is being relied on by the defendant; so that whether it comes in from the Government or comes in from the defendant, it seems to me to make relatively little difference. It is before the Court now.

MR. RASKAUSKAS: I respectfully differ with Your Honor.

THE COURT: I do not mean that you cannot answer it, but they say in Paragraph 8, if you have read that?

MR. RASKAUSKAS: I have read that very carefully, Your Honor.

THE COURT: In 7 and 8, they say that--

MR. PRETTYMAN: And 6 also, Your Honor.

THE COURT: And 6 also, all right.

"For a number of reasons, including his past history and his position as National Commander of the Legion of Estonian Liberation the defendant has been a source to this Agency of Foreign Intelligence Information pertaining inter alia to Soviet Estonia and to Estonian emigre activities in foreign countries as well as in the United States.

"7. The Central Intelligence Agency has employed the defendant from time to time--concurrently with his duties on behalf of the Bureau of Public Roads--to carry out specific assignments on behalf of

the Agency. Defendant was so employed on those occasions specified in Paragraphs 5, 6, and 7 of the complaint.

"8. On those occasions specified in Paragraphs 5, 6, and 7 of the complaint, the defendant was furnished information concerning the plaintiff by the Central Intelligence Agency and was instructed to disseminate such information to members of the Legion so as to protect the integrity of the Agency's Foreign Intelligence Sources. Accordingly, when Juri Raus spoke concerning the plaintiff on the occasions about which complaint is made, he was acting within the scope and course of his employment by the agency on behalf of the United States."

Now, that seems to me to be a clear statement.

MR. RASKAUSKAS: No. I appreciate Your Honor's position in this matter, and maybe this might clear matters up somewhat.

An affidavit in support of a motion for summary judgment under the provisions of Rule 56 (e) must state such matters to which the affiant is competent to testify at trial.

THE COURT: Yes.

MR. RASKAUSKAS: The affidavit may not be a

collection of factual conclusions. He may not state ultimate facts. He may not state things which are for a Court or for a jury to determine.

Now, we have a factual determination in this case, and that is whether Juri Raus was in fact acting within the scope of his employment.

The fact that there is a secrecy provision involved is unfortunate, perhaps for both sides; but that still does not obviate the problem that exists as to the factual resolution.

Now, this plaintiff is not willing to be bound by the unilateral assertion of any member of the Executive Branch as to whether an individual was acting within the course and scope of his employment. That is the ultimate fact which we are hopeful one day this Court will resolve.

THE COURT: Well, I think the Court will have to resolve that, as I understand it.

Do you contend, Mr. Prettyman, that the mere raising of the point stops the case or that there must be proof of the point?

MR. PRETTYMAN: Well, we say there is proof of the point. There is the same proof here as there was in Howard v. Lyons.

THE COURT: You mean the affidavits?

MR. PRETTYMAN: Yes, sir.

THE COURT: The affidavit goes as far or further than it went in the Boston case?

MR. PRETTYMAN: Yes, it certainly does. It shows the nature of the duties to more extent, and it clears up any possible conflict.

THE COURT: Was that a summary judgment case?

MR. PRETTYMAN: Howard v. Lyons, yes, it certainly was.

THE COURT: Well, now, the point is however, is that the plaintiff will have an opportunity to file a counteraffidavit, or it is possible without the Court infringing on the executive privilege, I suppose he can attempt to take the deposition. I think the deposition had better be taken before the Court because there are going to be rulings on every question.

That was what I suggested, that if these facts in here are supported and if they are not controverted adequately I suppose they would be sufficient for summary judgment. Therefore it is important for the plaintiff to try to avoid that.

MR. PRETTYMAN: Well, Your Honor, I do want to emphasize to you that they have supplied no affidavits that in any way contradict the only two questions before us.

The question is, was he employed, and secondly, was he acting within the scope of his employment?

THE COURT: All right, but they have their difficulties by introducing evidence to controvert it, and I want to hear from counsel for the plaintiff of how they propose to controvert this affidavit.

MR. RASKAUSKAS: If Your Honor please, that is an affirmative defense for the defendant to prove.

THE COURT: Well, I am ready to say right now that this affidavit is sufficient to prove it unless you have some adequate counterevidence.

MR. RASKAUSKAS: Yes.

May Mr. Stanford address himself to that particular point?

THE COURT: Yes. It seems to me, and that is why I want to give you the opportunity to produce what you may have.

MR. STANFORD: Your Honor, I would like to again read Paragraph 8, which I think is the essence--

THE COURT: All right.

MR. STANFORD: --of the second affidavit of Richard Helms. I would like to read that in the light of his initial affidavit since in reality there has been very little modification despite the fact that there has been additional verbiage.

THE COURT: Well, it was not so much the fact that I was dissatisfied with what he said in the first one as I was not satisfied with the authenticity of it. It came in not as from the Government and not with the usual Government certificate. I wanted to be sure that it was authentic.

I am glad to hear you.

Go ahead.

MR. STANFORD: Your Honor, Paragraph 8 of the affidavit of Richard Helms has in common with the prior affidavit the fact that it successively intends to give the impression that the defendant was following his instructions at the time he made these statements; but I would like to read that statement and analyze it very, very carefully.

The first sentence says that:

"On those occasions specified in Paragraphs 5, 6, and 7 of the complaint, the defendant was furnished information concerning the plaintiff by CIA."

We have no information here, and nothing is said as to what information was furnished.

THE COURT: No, that is right, that is what they say, and I understand that.

MR. STANFORD: All right.

So we do not know what information was said

about, or given to Juri Raus about Eerik Heine. We do not know whether they said he was suspicious, that he was a KGB Agent, and we do not know what was said.

Then Helms states:

"That Raus was instructed to disseminate such information to members of the Legion."

We do not know what information he was told to disseminate. We do not know whether it was, "Look out for Eerik Heine, be careful of him, do not be too persuaded by his statements, you must view with suspicion anyone who is so vitally anti-communist."

We do not know whether that was said or anything more was said.

Then we are not told in this affidavit, nothing is said in Paragraph 8 that Juri Raus did in fact convey any of this information to the Legion. We are not told that. No allegation or assertion is made of that sort. All we have is a gap, and of this which is wide, and then a final statement of conclusion, the imperious statement by Helms, which we say does usurp the position of the Court when he again makes his judgment:

"Accordingly, when Juri Raus spoke concerning the plaintiff on the occasions about which complaint is made, he was acting within the scope and course of his employment by the agency on behalf of the

United States," another judgment being made by Helms.

THE COURT: But the only way you could get behind that would be to show verbatim what he was told by the agency.

MR. STANFORD: Yes.

THE COURT: And how much, and so forth.

MR. STANFORD: Yes.

THE COURT: And if you got that, you would probably--well, we have to assume for the purposes that the plaintiff may or may not be a Soviet agent or that the Soviet agents are, even though this man is not a Soviet agent, even though he is everything he says, the plaintiff is everything he says he is, certainly that the Soviet agent might be very much interested in where the CIA got the information, and if further details were given it might easily lead to the disclosure of the entire United States counterespionage.

MR. STANFORD: Your Honor, it may be the most vital information in the history of the world; but that is exactly our point, that this judgment made by Richard Helms that he was acting within the scope is a legal opinion by him.

There is no statement that, no factual assertion in here that the statements made, which we allege

in our complaint, statements, slanderous statements we allege, malicious and slanderous statements, there is no allegation here that the statements made were under instructions.

There is a wide gap there.

Now, would this reveal anything about the secret plan of the United States, the counterespionage plans, if the affidavit said that the information was given to him, and information was told to him to tell the Legion, and that that same information was what constituted his utterances?

We do not have that in this affidavit. We have a marked difference. All we have is that he was given information and that he was told, "Give this information to the Legion," and then we have a wide gap, and then the assertion which is a legal opinion of Richard Helms, which is the Court's decision rather than Richard Helms' that this was in the scope of his employment.

This is not sufficient on its face to constitute a defense, and in the course of the points or in the juncture of this particular hearing, it is not an assertion of a defense which should allow the amendment to be made because of the fact that this does not assert, and there is no assertion here which is sufficient.

THE COURT: No assertion where? In the

answer?

MR. STANFORD: We have only the statement--

THE COURT: Or the affidavit.

MR. STANFORD: In the affidavit, in Paragraph 8, that information was supplied to Juri Raus, and we do not know what that information was.

The next statement we have is that he was instructed to disseminate such information to members of the Legion. We have no statement that he did in fact disseminate that same information. We have no statement that that information was to tell the Legion that he was a KGB Agent.

We believe that on the second writing of this affidavit, a careful second writing, a calculated and formulated affidavit, that if they could have said that they would have said that, but in the absence of it, and I am not sure I am making it clear.

THE COURT: Yes, I understand the point, but the question I wanted to ask was whether that was an inadvertence or whether the Government is willing to make the affidavit more specific on that point to meet the point that is made if they can.

What position is the Government going to take on that?

MR. MARONEY: Your Honor, I do think this

that--not speaking for the Government, but I do think this language has to be read in the context of the fact that it is answering the plaintiff.

It says:

"On those occasions specified in Paragraphs 5, 6, and 7 of the complaint," and then further, "Juri Raus spoke concerning the plaintiff on the occasions about which complaint is made."

THE COURT: Yes.

MR. MARONEY: It seems to me that is clear.

THE COURT: Well, it does not literally say that he was told that this man was a communist or that he was not told that this man was a KGB Agent, and it says that when he spoke concerning the plaintiff he was acting within the scope of his authority.

Well, now, I think that is clearly inferable.

MR. MARONEY: I think so too.

THE COURT: Paragraph 8 could be more specific.

MR. MARONEY: In other words, claiming he said what he said.

THE COURT: You argue that the Court should draw the inference from it, or really it is not a question of inference, but you say I should construe it.

MR. MARONEY: Yes, sir.

THE COURT: As saying that when he spoke concerning the plaintiff on the occasions about which complaint is made he was acting within the scope and course of his employment by the agency on behalf of the United States.

Now, it is one possible construction as suggested by this sentence that he was acting in the course of his employment when he made this speech, without saying that he was authorized to say this.

Now, you have got two questions, a question of law, and a construction of this paragraph, and a question of law that follows, of whether that admits the privilege, if you do not make it more specific.

Now, of course, if it should be construed to be as specific as they say, then the point evaporates. I am not passing on whether it is sufficiently specific. If it is sufficiently specific, I think it is all you need probably.

If it is not sufficiently specific, the question would be, is the Government willing to make it more specific in order to avoid the possible point and further possible inquiry, or does the Government and the defendant wish to stand on the affidavit as now drawn with this possible infirmity suggested?

I am not ruling on the proper construction.

MR. MARONEY: Well, if Your Honor would disagree with us as to the construction it may be we would then have to check with Mr. Helms to see what he is willing to say. Of course, we do get into the question here again of the secret information that was permitted, and of course the man does not have to say word for word.

THE COURT: Well, of course, he does not have to, but what he is charged with is very simple of having said particular things.

Now, you have a different question of law if he was acting, as he says, that he, "Was furnished information concerning the plaintiff by the Central Intelligence Agency and was instructed to disseminate such information to members of the Legion so as to protect the integrity of the agency's foreign intelligence sources."

Now, if the information he was given was that this man was a communist and he was a KGB Agent, then the legal point is relatively simple.

If he was simply given some general information and drew his own conclusions from it you have a somewhat more difficult legal point on which you may still be entitled to win. That is, that the man may be entitled to use a certain amount of judgment in what he says, and you have some authorities which apparently support that.

Obviously the legal question the Court will

have to decide is going to be slightly different if the affidavit says one thing than if it says another.

Now, you say I should construe it as saying what Mr. Stanford says it does not say. I do not want to pass on it.

MR. MARONEY: We will obviously be happy to abide by Your Honor's decision, and if you do not so construe it, then of course perhaps these gentlemen can check back with Mr. Helms and see what he has to say.

THE COURT: I was just going to say that while everybody is here it would just save a great deal of time if this is what he was told, that if this is what he was told, the affidavit has been drawn, you say, and I think Mr. Kenney says in effect to give that.

MR. MARONEY: That is the whole point of the affidavit.

THE COURT: To make that.

MR. MARONEY: That is the effect of the affidavit and it becomes senseless if it has a different interpretation or a different interpretation is put on it.

THE COURT: That is right.

MR. MARONEY: If that is what he was not told.

THE COURT: Well, why leave it to interpretation if it can be made specific.

MR. STANFORD: Your Honor, I think that is just the point that it was not carelessly left in this fashion.

THE COURT: I see.

MR. STANFORD: That it was most carefully drawn with full calculation in order to allow this to be brushed by, which it was in the first reading by me.

THE COURT: Well, I am not passing on it one way or the other aside from this point, and I certainly read it originally as the Government, or as the defendant would have me read it. You make this point that there may be a difference, and I think we might as well find out whether the Government is willing to be more specific or whether they want to leave it this way.

MR. STANFORD: Your Honor, this is their second time on this particular motion.

I would like to call the Court's attention to the fact that this very vital point was brought out in Kelley vs. Dunne, 344 F. 2d 129.

THE COURT: What case?

MR. STANFORD: Kelley vs. Dunne, 344 F. 2d 129, at page 132, where it states:

"Taking these cases collectively, the principle is established that the free and untrammeled behavior of certain government

is
representatives/so important to the public welfare that, within limits, they should not be exposed to liability for damages by charges of improper motives, or of conscious wrongdoing. The difficulty is the extent of the principle. We may note however certain common denominators. In the first place the conduct of the defendants in all cases, viewed without reference to the defendants' alleged motives, was within the normal scope of their agency powers. A second common denominator is that the activity of the defendant was prima facie in accordance with his duties and customary behavior. It is usual for an Attorney General to take procedural steps to enforce the statutes, for a disbursing officer to explain the circumstances of a payment, for an information officer to give out information. While no act can ever be judged in vacuo, but only with some measure of reference to external circumstances, some actions require very little showing in order to appear at least prima facie justified, while others need elaborate support."

Now, this particular case, the affidavit on its face would classically fit into that latter category. We have a man here who is a part-time employee, a person who is, I chink it may properly be said, was really only a

link with the Estonian community. As a matter of fact, we are told that he did have a full-time job with another organization, and that his contact, his employment was only for the purpose of his liaison with the Legion, the Estonian Legion.

THE COURT: Well, isn't that the normal way of engaging in--

MR. STANFORD: We do not know.

THE COURT: --in intelligence and counter-intelligence activities?

MR. STANFORD: We do not know, Your Honor. I do know that they have a gigantic building out there in George Washington Parkway out on the Potomac, which employs many full-time people.

THE COURT: Counterintelligence agents ordinarily do not wear uniforms, I understand.

MR. STANFORD: But we are told that this man is a full-time employee of another government agency.

THE COURT: Well, that is right, if he is acting as an undercover man.

MR. STANFORD: Well, we are not really told that, Your Honor.

THE COURT: Well, he has told that he was acting for this agency, and it is an agency which normally makes use of all sorts of people.

MR. STANFORD: What I meant, Your Honor, is this: That in these particular circumstances there must be a full and elaborate showing, as set forth in the Kelley vs. Dunne case, that this was one of these common denominators, that this is one of the normal ways of operating, that he normally made statements, that he was normally given authority; and we have to determine also whether or not he was specifically instructed to do this.

Now, I do not see how any possibility could be, that there could be any possibility that there would not be a statement in Paragraph 8 that he was instructed specifically to make these statements, if in fact he had this.

As a matter of fact, in the secrecy agreement, which we have attached to the affidavit, attached to the last pleading by the defendant, the secrecy agreement in Paragraph 2 says that the revelation of the fact that an agent, like Juri Raus, has information received from a government agency will not be done, as it says in Paragraph 2, will not be disclosed to any person "unless I have been specifically authorized in writing to do so by a representative of CIA."

Their very secrecy agreement says that whenever he is told to reveal information to other parties, which he certainly did in this particular case, that he would be

specifically authorized in writing to do so by a representative of CIA.

Therefore they must have, if they are following the procedure, which they tell us they wish us to follow, that some specific authority was given to Juri Raus as to what he could disclose.

THE COURT: They say they gave him such instructions.

MR. STANFORD: They do not say what those instructions were.

THE COURT: No.

MR. STANFORD: And I think that this is a cloud or a cloak.

THE COURT: Yes, I understand what you mean, and it may be so; I do not know, and I want to find out whether the Government is willing to make it more specific.

If not, you then get to the question of whether they have not made it more specific because if they stated verbatim what they had told him it would lead to the agents who gave that, the secret agents, who gave him that information.

MR. STANFORD: Exactly, Your Honor, but who is to benefit from that and who is to suffer from that? We say that the CIA before any statement or utterance is made that when inquiry is made in the course of the trial

that they will shut the cloak down, and they have subjected the individuals in this particular litigation as a result of their instructions, that they can then not assert this, and this must then be detrimental to the defendant and not to the plaintiff.

If they can not prove their defense, if they cannot show that he was within the scope of his employment, or if they refuse to do so that is unfortunate for the defendant, and they will have to reimburse him or indemnify him for the wrongs that he does to private individuals, individuals who, as in this case are militant anti-communists on the face of things and in their reputations throughout this country and Canada, and I think that must be considered. I think we are really looking at this as a benefit to the defendant, and that is the unfortunate thing that occurs, that the defendant cannot prove his case.

THE COURT: Well, your man is engaging in anti-Soviet activities; is that right? Is he an agent of the Intelligence, of the anti--

MR. STANFORD: He is a patriot, Your Honor.

THE COURT: All right, but when people engage in intelligence and counterintelligence activities, if they can bring lawsuits and have all information spread on the record, it is an unusual way of conducting

intelligence, of espionage and counterespionage activities.

MR. STANFORD: He is not asking for the information. What we are saying is that if they refuse to supply the information for their own defense it must inure to the detriment of the defendant, and not to the plaintiff because you can't come outside a door from a room of secrecy, and announce the fact that this was within the scope of employment, and then jump back into the room and say that, "We can't explain it. You must accept our judicial decision, and you can't go behind it."

That is what we are being asked to do or what the Court is being asked to do by the defendant. They are like a jack-in-the-box who jumps up and says, "Scope of employment," and as soon as you try to make a factual determination, he jumps back again in the box and says, "No inquiry shall be made."

This cannot help but inure to the detriment of the defendant.

THE COURT: Well, that is what I said the defendant could not do, but whether the Government can do it is another matter.

MR. STANFORD: But the Government has not.

THE COURT: Well, that is what we want to find out as to what they are going to do.

Now, is the Government in a position to say

whether they can be more specific or do you want to check and see?

MR. MARONEY: I am not in a position to answer that, Your Honor, but I would be glad to go back and to make inquiry of Mr. Helms to see whether that matter can be further clarified.

THE COURT: I think we ought to know that. We can then discuss where we go from here on the basis either that it will be clarified or that it will not be clarified.

In either event I have got to make a decision on the summary judgment one way or the other.

Now, before making the decision on summary judgment we have the request to take the deposition of Mr. Raus, the defendant.

MR. PRETTYMAN: Your Honor, am I going to have an opportunity to reply?

THE COURT: Yes.

MR. PRETTYMAN: To answer some of the statements that were made?

THE COURT: Yes, go ahead.

MR. PRETTYMAN: I do not want to unduly prolong this, but I think for the record I should make several things clear.

They say that there was no statement from the

defendant in the record that he was precluded from testifying at the outset. Of course, it is not necessary to have a statement from the defendant. We have a statement, a sworn statement from his attorney in the record; and moreover, and more importantly, it was not just by a specific direction by his superior that he was precluded from talking, but it was in the law.

The statute says, and the secrecy agreement says, which is in the record, it says that he was precluded from talking.

Next they say that we cannot prove our defense. Well, we have proven it because the only two factors here are employment and scope of duty.

In Howard vs. Lyons again there was a very simple affidavit, and I do not think I need to comment any further on that particular point.

THE COURT: Well, that is the point that if you have to stand on this affidavit, if the Government does not clarify this matter, then the Court has got to construe it.

MR. PRETTYMAN: Yes.

THE COURT: And if the Court construes it the way you say, it is just as good as if it says it specifically provided it stands, that the construction stands up on appeal.

If the Court does not construe it the way you have and feels it is more ambiguous, then you have got to win on the point that if he was speaking in the course of his employment he could go beyond what he had been told in the exercise of his judgment as an agent or he could word it a little differently. I do not suppose he has to word it in totidem verbis the way he is given, and he can say it if he is given something in technical language he can say it in popular language, and matters of that sort at least, and perhaps he can use his judgment as to what ought to be said.

All of those things are going to depend upon case law.

MR. PRETTYMAN: Well, this affidavit; I am sure, was indeed carefully drawn, but not for the reasons that they say. It was carefully drawn, I am sure, so as not to reveal one iota of information more than was absolutely essential to plead.

THE COURT: Well, you say it was intended to mean--

MR. PRETTYMAN: Yes.

THE COURT: What Mr. Stanford says it does not say.

MR. PRETTYMAN: Well, I am perfectly happy to have them go back to Mr. Helms and see what more can be

said.

THE COURT: All right. Let us see if it can be clarified.

MR. PRETTYMAN: Yes.

THE COURT: Well, that is to be done. Now, we have got to have that done before we can do anything else, because where you go from there depends upon that, I suppose.

MR. PRETTYMAN: The plaintiff says that under Rule 56 (e) the assertions must be those that the affiant can testify to and that here since he can't testify as to all the facts that you should disregard this affidavit.

Of course, if that argument were true, Your Honor, the CIA would be automatically taken out of all protection with respect to absolute immunity because there are many things that you can charge an agent with saying which he could not--

THE COURT: Which he could not prove. That is undoubtedly a very serious point.

MR. PRETTYMAN: Yes, sir.

THE COURT: When you are dealing with matters of espionage and intelligence and counterintelligence it presents a different case, and I think as Mr. Stanford's own case said, that these things can't be considered in a vacuum, that you have got to consider and weigh the interests of both

sides.

I will weigh the interests of both sides, as I think I indicated last week; and it is not an easy matter, and I want to have it narrowed down as much as we can.

MR. PRETTYMAN: We are lucky here that the Deputy Director has seen fit to reveal as much as he has, though I can easily imagine a case where a foreign agent could accuse a secret agent of slander as to which there could be no answer at all because the mere revelation of employment would itself endanger the national interest.

THE COURT: That is right. These are very difficult problems.

MR. PRETTYMAN: Yes, sir.

They refer to Kelley vs. Dunne. We want to point out, Your Honor, that in that case the opinion was written while certiorari was pending in the Norton vs. McShane case, that in Kelley vs. Dunne the Court disagreed with Norton vs. McShane, and that thereafter the Supreme Court denied certiorari in Norton vs. McShane.

But even more importantly there--

THE COURT: Norton vs. McShane. Is Norton vs. McShane on your list?

MR. PRETTYMAN: Yes, sir. They both are. We cited that to you the last time, and it is also in our motion, in our points and authorities.

THE COURT: All right. I understand that the denial of certiorari does not add very much to the authority of the original opinion.

MR. PRETTYMAN: I appreciate that. But I think there is a more important point to be made about Kelley vs. Dunne. There is no showing here that what happened was not part of this man's normal CIA duty.

THE COURT: You say it is not shown that it was not. You just told them that ten days ago, and they say they want to try to make the showing, and the way they want to try to make the showing is to ask Mr. Raus some questions.

Now, how else can they make the showing?

MR. PRETTYMAN: Your Honor, the point that they are trying to make about Kelley vs. Dunne, as I understand it, is that the Court there said or there made a reference to statements made during the course of normal duty.

The point I am making here is that this affidavit shows that the CIA's normal duties are to gather foreign intelligence information, and it is normal to protect the foreign intelligence sources, which is apparent from this.

THE COURT: Well, I do not have any question, and I thought I made the point before you did in interrupting

Mr. Stanford that in intelligence work what are normal procedures are not the same normal procedures that are involved in some of the Agricultural Department activities, let us say.

MR. PRETTYMAN: Well, finally, Your Honor, you made some reference to the possibility of depositions. I do want to urge upon you that you please consider that most carefully.

This is a situation, and again I keep coming back to Howard vs. Lyons, because it seems to me that it is a comparable situation. In that case when the superior filed the affidavit saying that it was in the normal course of his duties to give out the statement to the Massachusetts Delegation and to the press, and here this man had handed out a serious defamatory statement, there was no deposition to find out, "Well, how many times have you talked to the press? How many times have you done it before? What was your relation with the Massachusetts Delegation?"

That was considered sufficient for purposes of summary judgment, and there has been nothing put in this record to contradict that.

THE COURT: Well, all right, I have said that I think your affidavit is sufficient standing by itself.

Did the plaintiff in the case you referred to seek to obtain information by discovery to controvert the

affidavit?

MR. PRETTYMAN: I do not know that, but I do know that there has been nothing introduced, at least today in this case.

THE COURT: Well, all right, but he has requested to take the deposition of the defendant, and it seems to me there are only two people who can possibly--well, there are only two classes of people, one of which is a class of one, Mr. Raus himself, and the other are his employers in the CIA, the people in CIA.

They are the only people who can be examined on this. Now, I am not saying that any questions can properly be answered, but I am not clear why they should not have the right to ask him some questions and have him claim the privilege on those that he feels, you feel, or the Government feels he should not answer.

Now, he can certainly tell his name, I suppose.

MR. PRETTYMAN: He can say anything that has already been said on the record, as I understand it.

THE COURT: That is right.

MR. PRETTYMAN: But can't go or give anything in addition to that.

THE COURT: All right. I think that is right, but if the affidavit means what you say it means, and

if his superior says, "Well, I made it clear in the first place, I do not have to do any better," maybe he can say even specifically what you say he may say, though I suppose the difficulty would be that if he waived, that might open things up for cross-examination, so I think it is better that if that is true it would be better for the Government to say it than for him to say it as a matter of policy.

But I am not sure that they have not the right to ask him some questions, and until we know what the questions are I do not see how they can be decided.

I think the thing is to bring him over here at a convenient time and let the plaintiff take his deposition as far as you and the Government are willing to let him go.

Again I say that if the CIA wants to have some important person in CIA present at the time in order to decide whether to object or not, for the Government to object, and to assert a privilege, I am perfectly willing to sit in Washington, to go to Washington and take that deposition.

MR. PRETTYMAN: Well, I do want to make it clear, Your Honor--

THE COURT: Mr. Kenney is here, and I think when we have the Judge and the United States Attorney, maybe the majority is here, but if the CIA people would like

it in Washington I am perfectly willing to go over to Washington and have the deposition taken in Washington.

MR. PRETTYMAN: Well, I just want to make it clear for the record that as we understand the law they have no right in the face of the uncontroverted affidavit on a motion for summary judgment to take the deposition simply because they want to take the deposition, and we think that as the record now stands that you can decide the motion for summary judgment without it.

THE COURT: Well, Mr. Prettyman, that is not the way we practice in this Court. Just because you file an affidavit and they have not got the information to file a counteraffidavit does not mean that they are not entitled to try to get the additional information, and the case that I will--well, the one that I think of, the summary judgment that I granted in Bond vs. Carling, Bond Distributing Company vs. Carling Brewing Company, the defendant filed a motion for summary judgment, and I held it up for some time to give the plaintiff an opportunity to obtain by discovery some facts that I said he had to controvert or I was going to grant the summary judgment.

He was not able to obtain the information, and after an appropriate time I granted summary judgment, and it was affirmed.

But just because you have filed an affidavit,

unless you say that the affidavit itself in the way it raises the claim bars the right to proceed, and if you say it is only by proof of the facts in the affidavit, I am inclined to be with you.

The plaintiff has got an awfully hard burden to make me say that the rule that he speaks of that there must be evidence which the man himself personally testified to should be applied in all of its strictness to the CIA and particularly where the security of the Government is involved. Obviously the rule has to be applied with some discretion.

But also the Court should not go any further from the usual method of proof than is necessary to protect the interest of the United States as distinguished from the interest of the defendant. So I suggest that we have a report from Mr. Kenney to you people promptly as to whether Mr. Helms is willing to be more specific in Paragraph 8 and whether or not if he is we consider time for taking the deposition of Mr. Raus, and it may be that you will raise certain claims to most, to so many of the questions that we will not get anywhere, but the Court will rule on them as they come until we have established a sufficient pattern that will make it futile to go any further or futile for you to object any further.

I do not mean to prejudge it, but I think they are entitled to make a try.

Now, do you want to attempt to fix any time now? Everybody is here from Washington. I do not want to bring everybody back, and in view of the suggestion by the plaintiff that they prefer to have things done formally maybe we can better do it while everybody is here in open court rather than to try to work it out by telephone calls back and forth to the Judge.

We do that routinely in Baltimore, but plaintiff's counsel objected to it being done here, and I am willing, if they are Washington rules, I will play Washington rules, but counsel on both sides come from Washington anyhow.

MR. RASKAUSKAS: May I be heard on that point, Your Honor?

THE COURT: Yes.

MR. RASKAUSKAS: First of all I would like to say as a parenthetical remark that my associate and I are as concerned about national security, I think, as anyone else is in this case.

Secondly, we believe in the amenities and courtesies that counsel always extend to each other in the course of counsel and because we all hope to practice a

number of years and would like to have it as pleasant as possible, as arduous as it sometimes gets.

But what we objected to was an informal approach in what we contend to be an extremely serious case where the defendant wanted to set up a hearing date here and presented us with a big surprise, and it was only after I talked to your Clerk, Your Honor, that we got this affidavit in the mail, and I believe that was through the instructions of the Court through your Clerk.

But we were just given a date, and we did not think it appropriate for counsel to come running over to Baltimore for a mystery session. So that is the reason.

We are delighted to observe any amenities we can with all counsel.

THE COURT: Well, I do not want to bring people from Washington to Baltimore unnecessarily just to work out details.

Now, can we get any idea how long it will take Mr. Helms to decide or whether he will modify the affidavit or not?

MR. MARONEY: As to whether we can supplement the affidavit with respect to Paragraph 8?

THE COURT: Yes.

MR. MARONEY: I would think we can do it, ascertain one way or the other within twenty-four to forty-

eight hours.

THE COURT: All right. Well, that is fine. Now, do you want to fix a date?

MR. PRETTYMAN: Assuming he is here, Your Honor.

THE COURT: Yes.

MR. PRETTYMAN: Mr. Maroney would have to get in touch with him.

MR. MARONEY: Yes. He was here two days ago.

THE COURT: All right. Now, do we want to try to work out a date and time for the taking of the deposition of Mr. Raus?

MR. PRETTYMAN: The only difficulty I have there, Your Honor, is that Mr. Connolly is not here, so I do not know his schedule, and I have extensive hearings beginning in Chicago in a case on May 4th which may take as long as six weeks.

THE COURT: Well, I think we can do it sooner than that. My guess is that this is not going to be a very long session, though it might. If he is going to be asked to answer 450 questions it is going to be a very different matter, but I think that if we get over the hurdles of whether he is going to be allowed to answer this, that, or the other type of question, why then maybe it can

be moved on to somebody else.

MR. STANFORD: In view of what Mr. Prettyman says about his being engaged in hearings in Chicago from the 4th for a period of about six weeks, and the Court's statement that we can probably handle that matter sooner, I know that Mr. Connolly is set for a trial next Monday because I am also engaged in that on the other side, Monday and Tuesday of next week, and I am sure it will take two days, unless settled, and it does not look like it will be, so that it might be two days, or three, Tuesday, Wednesday, and Thursday.

MR. PRETTYMAN: The following week might be even better, Your Honor, the last week of the month.

I am going to be in San Francisco che most of next week, but he may, and there is no reason why both of us have to be here.

MR. STANFORD: The following week would be beginning with the 25th.

THE COURT: That is fine. The only thing I know I have to do that week is to redistrict the Congressional Districts of the State, one of three Judges of the Court.

MR. PRETTYMAN: You say next week?

MR. STANFORD: How about the 27th?

MR. PRETTYMAN: That would be fine.

THE COURT: Well, let us see.

MR. STANFORD: Your Honor, can we---I think it would--

THE COURT: Do you want to go off the record for a minute?

MR. STANFORD: Yes.

THE COURT: Let us go off the record.

(Discussion off the record.)

MR. PRETTYMAN: Can we go back on the record?

THE COURT: Yes.

MR. MARONEY: In Mr. Helms' affidavit of April 1st there is an obvious error on page 3 in Paragraph 11. There is a reference to 403 d. The "d" should be in parenthesis. There was a Section 403 d without the parenthesis in the Code. It is still there but it has been repealed.

THE COURT: Is it agreed that I just correct that?

MR. MARONEY: Yes.

MR. STANFORD: Yes.

MR. PRETTYMAN: Yes.

The "g" however remains.

THE COURT: Well, then, I will hear from Mr. Kenney in the next couple of days.

Do you want to fix the time?

I think April 28th is about as good a day as I could have, either here or there. Just let me know.

MR. PRETTYMAN: I understand, just so I am clear on this, Your Honor, that if there is to be a supplemental affidavit from Mr. Helms we will attempt to file that promptly.

THE COURT: Yes.

MR. PRETTYMAN: Then Your Honor will decide on the basis of the affidavit as to whether this further deposition attempt is fruitless.

THE COURT: Well, I do not know. If he is going to say, that he is going to claim that he can't answer anything, that he is not going to be allowed, if Mr. Helms is going to say, "I am not going to let him answer anything."

MR. PRETTYMAN: Of course he has already said that.

THE COURT: Well, he said he can't go beyond--what did he say?

MR. STANFORD: Beyond what has already been stated.

THE COURT: To make no further disclosures pertainging to the use and employment of Juri Raus. If that means--let him be specific. If that means he is going to tell him not to answer any questions, then that answers it

it, and it may be that that is what this means, to make no further disclosures concerning his employment or relating to this matter without specific authorization by proper officials of the Central Intelligence Agency.

So it does not tell him not to say anything. It tells him not to say it without the disclosure of the agency, and if you are going to claim that he is bound by this, the only practical way to take the deposition is in the presence of somebody with authority to say "answer or don't answer."

MR. PRETTYMAN: Well, I thought Your Honor said, I thought Your Honor said that if the affidavit from Helms was specific enough on the question of what information was passed to Raus that then no deposition might be necessary.

THE COURT: I think it probably won't because I do not see how they are going to be able to accomplish anything.

MR. PRETTYMAN: That is the point that I am making, Your Honor.

THE COURT: That is up to them, and if they want to take the deposition--

MR. STANFORD: I feel that there may be a middle ground. In other words, we have that information which was disclosed to us, that is that information that

they refused to do, but there is a grey area as to how much we are allowed to get and how much we are not, and I would like to close that gap.

THE COURT: I think the plaintiffs have that right, and I suggest that we set this up in Mr. Helms' office if we can, and if he is the one who has to do it or to whomever he will delegate it of whether he will answer any questions, and we can go over there, and the privilege can be unless--well, I think there are two things: If Mr. Helms says, "I will claim privilege against any question. I will claim executive privilege on any question, and I will not allow Raus to answer any question," then it is futile.

MR. STANFORD: You mean about anything connected with the case?

THE COURT: That is right. Then I have got to decide it on that basis, but until he says that I am not going to assume it.

All right.

MR. STANFORD: As Mr. Raskauskas says we may be presumptuous about allowing us to go over there.

THE COURT: Well, I do not care, wherever he wants. I was just trying to suit his convenience. If he wants to come here that will suit me fine, and I usually have found when I subpoenaed the Attorney General that I get

somebody else with instructions that I am authorized to go so far and no further, but what I am saying is I will hold this in whatever is the most convenient place, whatever is indicated by the CIA and the Department of Justice.

MR. MARONEY: I do not think it would be necessary for the purposes of taking Mr. Raus' deposition to go to Washington or the CIA. I think that can be done here, and the interest of the CIA would be protected, with government counsel and perhaps a representative of the CIA present at the time.

THE COURT: Who will be authorized.

MR. MARONEY: Who will be--

THE COURT: Who will be authorized to tell him he may or may not answer.

MR. MARONEY: That is right.

THE COURT: --from the Government's point of view because what this is, he has been told not to answer. He has been told to make no further disclosures concerning his employment by the agency or relating to this matter without specific authorization by proper officials of the CIA.

Now, that may or may not mean that he cannot answer questions, that he has been told not to answer a question on deposition.

MR. MARONEY: Yes.

THE COURT: I think we ought to hear it question by question, and I think it is much better to have that privilege claimed by and the instructions to him given. Now, if the instructions are given repeatedly that "We are not going to allow him to answer any," why then the thing is going to be futile, but maybe it is worth a trip over here for such a thing as that.

MR. STANFORD: Your Honor, depending upon what amendment, modification, or decision is asserted by Richard Helms following the presentation by Mr. Prettyman and Mr. Maroney of the Court's finding at this time, we might want to take the deposition of Mr. Helms.

THE COURT: All right.

MR. STANFORD: If that were done we would ask it to be done simultaneously or at least together.

THE COURT: I think if his deposition is to be taken I think it had better be taken in his office because he would need to look at, if he is going to answer anything he would need to look at records, and we can't bring the whole CIA records over here to Baltimore.

MR. MARONEY: Of course, Your Honor, the Government would object very strenuously to the taking of Mr. Helms' deposition.

THE COURT: If he claims the privilege and

says that, whoever is the head or whoever is authorized to claim executive privilege, if he is the CIA's only--is the CIA an agency by itself?

MR. MARONEY: Yes.

THE COURT: It is not under any department, and if the head of the agency claims the privilege in any formal way the Court will recognize it, and I think I am required to recognize the executive privilege, and I will recognize it. But again I think it ought to be on the record in the case.

MR. MARONEY: Well, Mr. Helms has already done that in his affidavit which is already on file.

THE COURT: Well, you had better look up what the way is that you usually claim executive privilege.

MR. MARONEY: All right.

THE COURT: And be sure you have got it on the record clearly.

MR. MARONEY: Yes.

MR. RASKAUSKAS: I beg to differ. I think Mr. Helms has indicated he can give no information at this time but that he might be able to give information by inference, from reading Mr. Helms' affidavit by officials in the future.

THE COURT: Since I do not know that is why I am requiring it to be made clear, to clarify it.

All right.

(Thereupon, at 11:45 o'clock a.m., the hearing was concluded.)

- - -

Certified to be a true and correct transcript of the proceedings in the above case.

Francis J. Amero.
Official Reporter

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Approved For Release 2005/01/27 : CIA-RDP75-00770R000100100001-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE, Plaintiff,	)	
v.	)	
JURI RAUS, Defendant.	)	Civil Action No. 15952

A F F I D A V I T

Richard Helms, Deputy Director of Central Intelligence, being first duly sworn, deposes and says that:

1. Under the Director's Delegation of Authority to the Deputy Director of Central Intelligence, dated 28 April 1965, a copy of which is attached, I have been delegated all authorities vested in the Director of Central Intelligence in his position as Director of Central Intelligence and head of the Central Intelligence Agency including those authorities set forth in Central Intelligence Agency Regulation HR 10-20, a copy of which is attached.

2. I have familiarized myself with the allegations contained in the complaint in the above-entitled case.

3. I have familiarized myself with the Central Intelligence Agency's participation in communicating information concerning Eerik Heine to representatives of the Estonian emigre community in the United States.

4. During the periods of time specified in paragraphs 5, 6, and 7 of the complaint, the defendant, Juri Raus, was employed as a highway research engineer for the Office of Research and Development, Bureau of Public Roads, United States Department of Commerce.

5. During the same periods of time, the defendant was the National Commander of the Legion of Estonian Liberation, Inc., and was familiar with Estonian emigre activities.

6. For a number of reasons, including his past history and his position as National Commander of the Legion of Estonian Liberation, the defendant has been a source to this Agency of foreign intelligence information pertaining inter alia to Soviet Estonia and to Estonian emigre activities in foreign countries as well as in the United States.

7. The Central Intelligence Agency has employed the defendant from time to time -- concurrently with his duties on behalf of the Bureau of Public Roads -- to carry out specific assignments on behalf of the Agency. (Defendant was so employed on those occasions specified in paragraphs 5, 6, and 7 of the complaint.)

8. On those occasions specified in paragraphs 5, 6, and 7 of the complaint, the defendant was furnished information concerning the plaintiff by the Central Intelligence Agency and was instructed to disseminate such information to members of the Legion so as to protect the integrity of the Agency's foreign intelligence sources. Accordingly, when Juri Raus spoke concerning the plaintiff on the occasions about which complaint is made, he was acting within the scope and course of his employment by the Agency on behalf of the United States.

9. On May 29, 1963, prior to the occasions specified in paragraphs 5, 6 and 7 of the complaint, the defendant signed a Secrecy Agreement with the Agency, a copy of which is attached, which Agreement is still in full force and effect.

10. After a personal review of the Agency's activities pertaining to Eerik Heine, I have reached the judgment on behalf of the Agency that it would be contrary to the security interests of the United States for any further information pertaining to the use and employment of Juri Raus by the Agency in connection with Eerik Heine to be disclosed, other than the disclosures already made in the defendant's answer, my own affidavits, and the defendant's affidavits, which I have read.

11. Acting pursuant to the authority lodged in the Director of Central Intelligence by virtue of the provisions of Title 50, United States Code, Sections 403d and 403g, and the implementing Regulations promulgated thereunder, I have determined that it would be contrary to the national interest and would further compromise the proper protection of intelligence sources and methods to disclose further information in regard to those material matters which the plaintiff has sought to have revealed through his pleadings. I am herewith directing Juri Raus to make no further disclosures concerning his

employment by the Agency or relating to this matter without specific authorization by proper officials of the Central Intelligence Agency.

Richard Helms

Attachments as stated.

STATE OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

Subscribed and Sworn to before me this 1st day of April, 1966.

Notary Public

My commission expires 24 September 1969.

(SEAL)

DELEGATION OF AUTHORITY

I hereby delegate to the Deputy Director of Central Intelligence all authorities vested in me by law or by virtue of my position as Director of Central Intelligence and head of the Central Intelligence Agency, including, but not limited to, the certification authority set forth in section 8(b) of the Central Intelligence Agency Act of 1949, as amended, except for any authorities the delegation of which is prohibited by law.

All other delegations of authority currently in force remain valid to the extent they are not inconsistent with this delegation.

William F. Raborn Jr.

WILLIAM F. RABORN, JR.
Vice Admiral, USN (Ret.)
Director of Central Intelligence

Certified a true copy of the Director's Delegation of Authority to the Deputy Director of Central Intelligence, dated 28 April 1965 and incorporated into Central Intelligence Agency Regulation, HR 1-2b, last published 30 December 1965.

Louis G. Carrico
CIA Records Administration Officer

STATE OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

Subscribed and Sworn to before me this 1st day of April, 1966.

Edward R. Dougherty Jr.
Notary Public

My commission expires 24 September 1969.

(SEAL)

SECRECY AGREEMENT

1. I recognize that in connection with my confidential relationship with the Central Intelligence Agency (CIA) I will become apprised of information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods and operations, and specifically operations, sources, methods, personnel, fiscal data, or security measures. I realize that in addition to the actual information that comes into my possession because of my relationship with CIA it will be possible for me to deduce implications from such information. I understand that unlawful disclosure of this information or its implications could seriously jeopardize the national interests and security of the United States of America.

2. I solemnly swear, without mental reservation or purpose of evasion, and in the absence of duress, as a citizen of the United States of America that I will never divulge, publish or reveal, by writing, word, conduct or other means, any information or its implications of the character set forth above, including the fact or content of my meeting with representatives of CIA, to any person unless I have been specifically authorized, in writing, to do so by a representative of CIA. I understand that the term "any person" includes, among others, friends, relatives, spouses, employers or representatives of any State or Federal Agency, excepting only CIA representatives who have been specifically referred to me by the representatives of that agency whom I have met on the occasion of signing this secrecy agreement.

3. I understand that this agreement does not impose any restriction upon me or my employer with regard to information acquired by me or my employer in the regular conduct of business and not as a result of my relationship with CIA. The mere fact that such information is of interest to CIA does not subject it to the confidential treatment prescribed by this secrecy agreement.

4. I fully realize that intentional or negligent violation of this secrecy agreement may subject me to prosecution under the Espionage Laws of the United States of America (18 USC secs. 793 and 794).

IN WITNESS WHEREOF, I have set my hand and seal this 29 day of May, 1963

Witnessed by me this 29 day of May, 1963

at Hyattsville, Md [redacted] (SEAL)
Signature

Certified a true copy except the name of the witness has been obliterated for security reasons.

STAT

[redacted]
CIA Records Administration Officer

STATE OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

Subscribed and Sworn to before me this 1st day of April, 1966.

Edward R. Dougherty Jr.
Notary Public

My commission expires 24 September 1969.

(SEAL)

SECURITY HR 10-20

.20. PROTECTION AND DISCLOSURE OF INFORMATION

a. AUTHORITY. Under the National Security Act of 1947 and the Central Intelligence Agency Act of 1949, and under direction of the National Security Council, the Director of Central Intelligence is responsible for protecting intelligence sources and methods from unauthorized disclosure.

b. PROTECTED INFORMATION. The problem of determining what information relates to the protection of intelligence sources and methods is of such complexity that no final determination can be made in regard to any single piece of information within the Agency or the other intelligence components except at the Director's level. Under his responsibility for protection of such information there have been established overall policies and detailed procedures for the appropriate dissemination of information and for its protection in the executive branch of the Government. Every request for information outside of the system designed to serve the executive branch becomes a special problem requiring specific determination by or on behalf of the Director. Therefore, all files, documents, records, and information (whether or not reduced to writing) in the offices of the Central Intelligence Agency, including the several field offices, or acquired by any person as a result of service with or on behalf of the Agency, are to be regarded in the first instance as protected information.

c. POLICY. All persons are hereby prohibited from disclosing or using protected information for any purpose other than the performance of duties for or on behalf of the Agency, unless the Director of Central Intelligence or his designee has authorized the disclosure or use as not being contrary to the public interest. When deemed advisable by the Director, requests for protected information will be referred to the National Security Council for a decision on disclosure.

d. SUBPENA FOR PROTECTED INFORMATION

(1) Any person who is served with a subpena requiring the disclosure of protected information to a court or the Congress shall promptly inform the General Counsel of the service of the subpena, the nature of the information sought, and any circumstances which may bear upon the desirability of making available the information, in order that the General Counsel may advise the Director. Any action in response to the subpena shall be taken only in accordance with advice of the General Counsel. Disclosure may be authorized only by the Director or Deputy Director of Central Intelligence.

(2) If circumstances make it necessary for the Director to decline in the public interest to furnish the information, the person on whom the subpena is served (acting in accordance with advice of the General Counsel) or the General Counsel or his designee will appear in answer thereto and respectfully state that he is complying with specific instructions of the Director of Central Intelligence in refusing to furnish the information requested.

51

Certified a true copy of Central Intelligence Agency Regulation HR 10-20, effective 29 August 1952, renumbered 1 April 1961.

[redacted] 25X1

Louis G. Carrico
CIA Records Administration Officer

STATE OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

Subscribed and Sworn to before me this 1st day of April, 1966.

Edward R. Whitney, Jr.
Notary Public

My commission expires 24 September 1969

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15952
	)	
	)	
JURI RAUS,	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT

Richard Helms, Deputy Director of Central Intelligence, being first duly sworn, deposes and says that:

1. The purpose of this Affidavit is to specify the information concerning Eerik Heine which was communicated by the Agency to Juri Raus and thus to clarify Paragraph 8 of my previous Affidavit dated April 1, 1966, which I otherwise adopt in its entirety and incorporate herein by reference.

2. Prior to those occasions specified in Paragraphs 5, 6, and 7 of the complaint in this action, the defendant, in a series of conferences, was furnished information by the Central Intelligence Agency to the effect that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent. The defendant was instructed to warn members of Estonian emigre groups that Eerik Heine was a dispatched Soviet intelligence operative, a KGB agent. The purpose for this instruction was to protect the integrity of the Agency's foreign intelligence

sources, existing within or developed through such groups, in accordance with the Agency's statutory responsibility to collect foreign intelligence and the statutory responsibility of the Director of Central Intelligence to protect foreign intelligence sources and methods. Accordingly, when Juri Raus spoke concerning the plaintiff on the occasions about which complaint is made, he was acting within the scope and course of his employment with the Agency on behalf of the United States.

Richard Helms

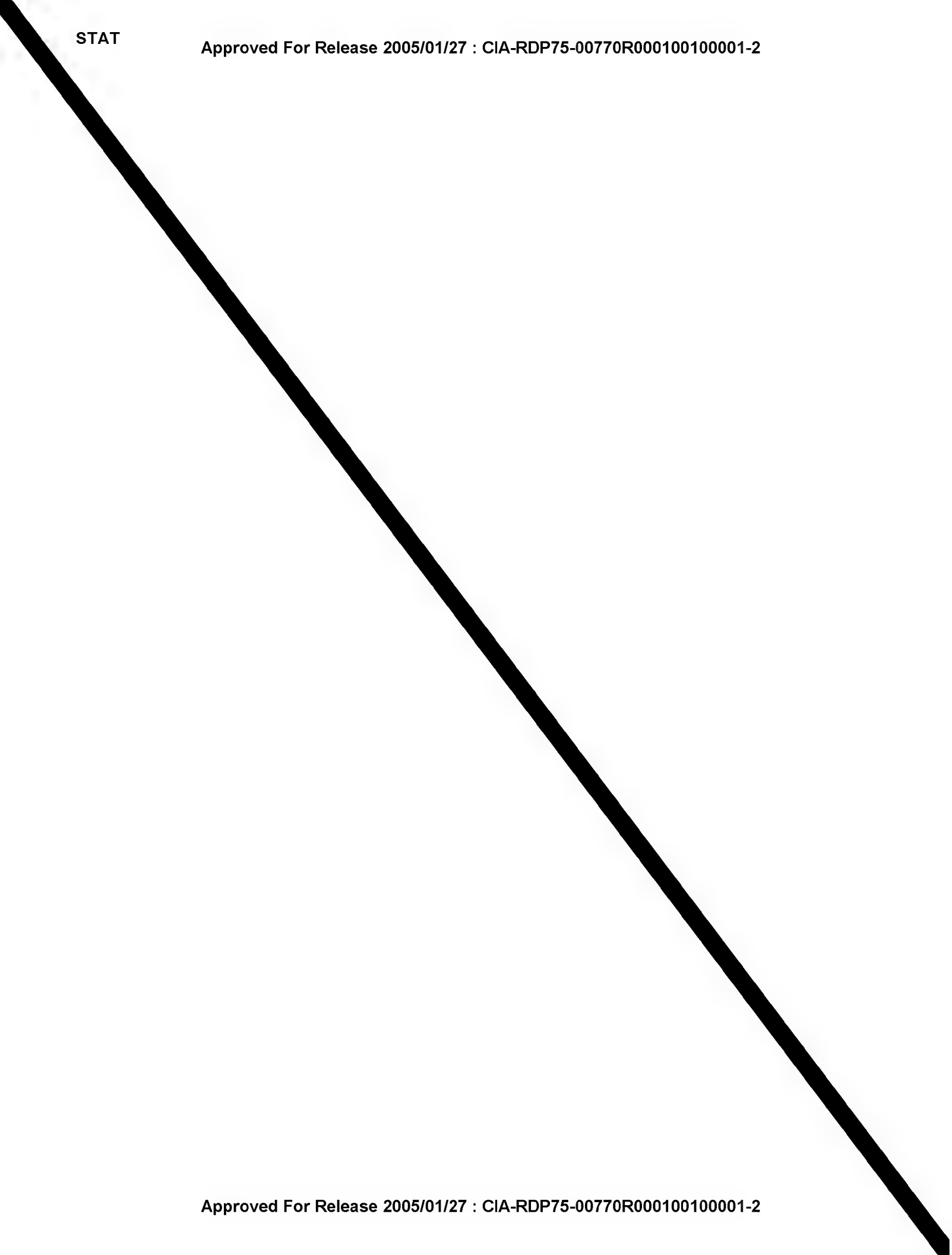
STATE OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

Subscribed and sworn to before me this 22nd day of April, 1966.

Notary Public

My commission expires 24 [illegible]

(SEAL)



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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND
BALTIMORE, MARYLAND 21202

ROBERT C. THOMSEN
CHIEF JUDGE

April 4, 1966

Ernest C. Raskauskas, Esq.
1418 Ray Road
Hyattsville, Maryland

Robert J. Stanford, Esq.
1730 M Street, N.W.
Washington, D.C.

Paul R. Connolly, Esq.
B. Barrett Prettyman, Jr., Esq.
Hogan & Hartson
815 Connecticuit Avenue
Washington, D.C. 20006

Re: Heine v. Raus - Civil Action No. 15952

Gentlemen:

I have read Mr. Prettyman's letter of April 1 to my law clerk, the transcript of the hearing on March 11 and all of the papers which have been filed in the case since March 11. I have concluded that the case should be set for further hearing on Thursday, April 14, at 10:00 a.m.

At that hearing the following matters will be considered:

(1) The filing of the amended answer. At the hearing on March 11, I stated that I would permit defendant to file an amended answer setting up absolute privilege. Defendant filed a motion to amend the answer and I signed an order on March 23 permitting it to be filed. Thereafter, plaintiff filed a motion to strike the motion to amend the answer, which the Court will consider also as a motion to strike the order entered thereon. Before making a final ruling,

Ernest C. Raskauskas, Esq.
Robert J. Stanford, Esq.
Paul R. Connolly, Esq.
E. Barrett Prettyman, Jr., Esq.

April 4, 1966

I will hear anything which either side wishes to add to the material which has heretofore been submitted, including the points and authorities filed by plaintiff on April 1.

(2) Whether defendant should be allowed to proceed with his motion for summary judgment, based upon the material already filed, the material which he proposes to file on April 4 or 5 and the testimony of a government official which he intends to offer at the proposed hearing; or whether defendant should be required to file a new motion for summary judgment. In any event, the Court will consider what further opportunity plaintiff should be afforded to answer such motion for summary judgment or to develop facts in support of its opposition to such motion.

(3) In connection with the last sentence, the Court will rule on any objections which defendant may have to the taking of the deposition of the defendant or to such interrogatories which plaintiff has filed or may file dealing with the question of privilege, as distinguished from the merits of the case.

It is not clear to me whether defendant intends to rest entirely on his right to raise the point, or whether the government intends to take any formal position in the matter, through the United States Attorney or otherwise.

It is my further understanding that, if a motion for summary judgment is not granted, the issue of privilege should be heard separately and in advance of any trial on the merits.

Very truly yours,

Chief Judge

RCT:LEL

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EERIK HEINE	)	
Plaintiff,	)	
vs.	)	Civil Action No. 15952
JURI RAUS	)	
Defendant.	)	

NOTICE OF TAKING OF DEPOSITION

TO: JURI RAUS
c/o E. Barrett Prettyman, Jr., Esquire
Paul R. Connolly, Esquire
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C.20006

PLEASE TAKE NOTICE that at 10:00 a.m. on the 12th day of April, 1966, at the offices of Robert J. Stanford, Esquire, Suite 205, 1730 M Street, N.W., Washington, D.C., the plaintiff will take the deposition of the defendant, Juri Raus, pursuant to Rule 30 of the Federal Rules of Civil Procedure, before George M. Poe, Notary Public, or some other person authorized to administer an oath, for the purpose of discovery or for use in evidence. The examination will continue from day to day until completed. You are invited to attend and cross examine.

Ernest C. Raskauskas
1418 Ray Road
Hyattsville, Maryland
Associate Counsel for Plaintiff
202 - 296-4272

CERTIFICATE OF SERVICE

A copy of the foregoing notice was mailed, postage prepaid, this 29th day of March, 1966, to E. Barrett Prettyman, Jr., Esquire, and Paul R. Connolly, Esquire, Attorneys for Defendant, 815 Connecticut Avenue, N.W., Washington, D.C. 20006

Ernest C. Raskauskas

FORD, SKEENS & RASKAUSKAS
ATTORNEYS AT LAW
910-17TH STREET, N. W.
WASHINGTON, D. C. 20006
296-4272

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